Compendium of Grievance Arbitration Decisions 1981

Nova Scotia
Department of Labour and Manpower
Research Division

COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS
1981

NOVA SCOTIA DEPARTMENT OF LABOUR AND MANPOWER
RESEARCH DIVISION

HONOURABLE JOHN A. MACISAAC
MINISTER

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FOREWARD

The attached is the third summary of grievance arbitration decisions (awards) published by the Nova Scotia Department of Labour and Manpower. The decisions listed herein are those which have been filed in accordance with amendments to the Trade Union Act effective May 1978. Subsequent to this date, summaries of grievance arbitration decisions have been prepared and released in the publication Monthly Summary of Activities, Industrial Relations Division, Labour Relations Board. Future arbitration awards received by the department will continue to appear in the above publication.

Part 1 of this report lists grievance arbitration awards by decision number. The indices which follow make reference to the decision number. It is recognized that there is a problem in accessing the decisions in the 1978-79 compendium. All indices are retrospective to include the years 1978 to 1981. It is necessary to refer to the first issue for summaries of the decisions for those years. Indexation of arbitration awards is based on Canadian Labour Arbitration by Donald J. M. Brown and David M. Beatty (Agincourt: Canada Law Book Co., 1977).

Copies of decisions will be made available to interested parties upon request but will be subject to a nominal charge for reproduction. Inquiries relating to the enclosed can be directed to the Nova Scotia Department of Labour and Manpower, Research Division, P. O. Box 697, Halifax, Nova Scotia, B3J 2T8 (Phone: 424-4313).

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PART 1

LISTING OF GRIEVANCE ARBITRATION DECISIONS, 1981

81-01: The Acadia University Faculty Association - AND - The Governors of Acadia

Judge R. E. Kimball, Chairman, M. Roger, R. Beazley
E. G. DeMont for the employer
E. J. Flinn for the union
W. O. Newton for the grievor
January 4, 1981

ISSUES: Just cause (7:1200)

CIRCUMSTANCES: The Grievor was discharged for allegedly making several improper sexual advances to several students. The Employer argued that this behaviour contravened the collective agreement whereby the parties agreed to develop "the quality and effectiveness of the education", "to encourage a dimate of freedom, responsibility, justice and mutual respect...", "to accept joint responsibility for pursuing the above objections....". The Grievor denied the allegations made against him and also argued that discharge on these grounds was only proper where the sexual offences complained of were unlawful.

AWARD: The grievance fails. The Board accepted the evidence of the Employer that the incidents of sexual harassment occurred. Discharge is justified where a professor violates the objectives of the university as outlined in the agreement.

81-02: Nova Scotia Government Employees Association - AND - Kentville Hospital Association

Judge J. A. MacLellan, Chairman, M. J. McPherson, C. Molton, dissenting
R. Pink for the union
G. North for the employer
April 20, 1981

ISSUES: Call-In pay (8:3400)

CIRCUMSTANCES: The Grievor claimed to be entitled to call-out pay for arriving at work an hour early, at the request of the Employer. He was paid an hour overtime and his regular shift pay. The agreement provided that four hours pay should be paid to "employees who have left the hospital and returned home and subsequently called back ... for immediate duty".

AWARD:

The grievance fails. The purpose of the call-out clause is to compensate an employee for the inconvenience, disruption and expense of returning to work. In this case, no additional trip to work was required.

DISSENT:

The clear and unambiguous words of the agreement ought to be applied in this case.

81-03: Canadian Union of Public Employees - AND - Yarmouth Regional Hospital

Judge J. A. MacLellan, Chairman, G. I. North, I. MacPherson, dissenting
G. MacIsaac for the union
D. H. MacDougall for the employer
May 12, 1981

ISSUES: Interpretation of collective agreement (4:2100)

CIRCUMSTANCES: The collective agreement provided that each employee of the unit on staff on the date of ratification was to receive a lump sum payment of $250. The Employer pro-rated this amount in the case of part-time employees. The Union grieved, claiming that part-time employees were entitled to the full $250. The evidence established that all monetary clauses in the agreement were subject to pro-ration when implemented in respect of part-time employees. The agreement provided that part-time employees "shall be entitled to all benefits on a pro-rated basis".

AWARD: The grievance fails. The word "benefits" refers to all monetary matters, including the $250.00 payment.

81-04: International Brotherhood of Electrical Workers, Local 625 - AND - Fairview Electric (1980) Limited

Judge J. A. MacLellan
W. MacInnes for the union
G. McConnell for the employer
April 28, 1981

ISSUES: Damages (2:1410)

CIRCUMSTANCES: In a previous award, this Arbitration Board determined that the Employer had employed a non-union employee contrary to the collective agreement. Jurisdiction to hear any dispute arising out of enforcement of that award was maintained. The company contended that the full amount of wages paid to the non-union employee ought not to be owed to the union.

AWARD: The employee worked seven months. The Employer must pay the Union seven months Union dues and seven months of pension fund benefits. As to wages of $11,415.00 which were paid to the employee, having regard to the substance of the matter the Union should receive $2,000.00 in respect of such wages, to be distributed among its members.

81-05: A Certain Individual - AND - The Halifax Infirmary

Leo McIntyre, Chairman, G. MacIntyre, M. McPherson
March 3, 1981

ISSUES: Call-in pay (8:3400)

CIRCUMSTANCES: The Grievor was asked to work overtime. He went home, at his own violation, and returned to do the work after his supper. He was paid the

81-05 (continued)

overtime rate for hours worked rather than the call-out pay of four hours. He grieved that he was entitled to call-out pay for this work.

AWARD: The grievance fails. The underlying purpose for call-in or call-back pay is to compensate the employee for having to come into work. In this case, no such trip was required.

81:06: Nova Scotia Union of Public Employees - AND - City of Dartmouth

W. Brent Cotter, Chairman, M. J. MacPherson, P. Ronayne, dissenting
H. Epstein for the union
M. Moreash for the employer
April 13, 1981

ISSUES: Leaving work without permission (7:3130). Effect of s. 33 of Trade Union Act.

CIRCUMSTANCES: The Grievor was discharged for alleged neglect of duties. He had been subject to two previous penalties on other occasions, a suspension and a reprimand. The Grievor failed to fulfill a number of significant job duties. At the time of the discharge, the Union had given notice to bargain a new collective agreement. The Union argued that s. 33 of the Trade Union Act, which enacts a "freeze" on certain conditions of employment after such a notice is made to the employer, extends so far as to prevent discipline or discharge of employees.

AWARD:

The grievance fails. Discharge was justified in the circumstances. The statutory freeze does not prevent the normal functioning of the Employer's operation. The Act contemplates only that changes in terms of employment not be permitted, and prior to the notice to bargain being delivered, the employer was entitled to discharge for just cause.

DISSENT:

The Grievor's transgressions in carrying out his duties were not serious enough to warrant discharge.

81-07: Richmond Fisheries Incorporated - AND - United Food and Commercial Workers, Local 309

Charles O'Connell, Chairman, B. W. Chapman, K. Hawley
R. Saunders for the employer
P. Martell for the union
May 21, 1981

ISSUES: Refusal to obey instructions (7:3610, 7:3612, 7:3621)

CIRCUMSTANCES: The Grievor was suspended two days for failure to follow instructions. Her supervisor ordered her to clean haddock without the use of tweezers. She refused to follow this order. She testified at the hearing that be using tweezers she could avoid work in cold water, which she claimed would bring on an attack of phlebitis.

81-07 (continued)

AWARD: The grievance fails. The proper course for the Grievor was to work and grieve. Neither is her medical excuse a valid one, as there is no proven connection between cold water work and phlebitis.

81-08: Nova Scotia Union of Public Employees - AND - City of Dartmouth

S. Bruce Outhouse, Chairman, M. McPherson, P. Ronayne, dissenting
H. Epstein for the union
M. Moreash for the employer
May 20, 1981

ISSUES: Careless Work Performance (7:3520); Burden of Proof for Discriminatory Action; Severity of Penalty (7:4000); Multiple Penalty (7:4240)

CIRCUMSTANCES: The Grievor, a pumphouse operator, missed the source of a chlorine leak at a water pumping station, after failing to make a regular third inspection of the station basement during his shift. He was first orally reprimanded by his supervisor, and subsequently suspended for two weeks for negligent work performance. He grieved both the validity of the penalty and its severity.

AWARD:

The grievance fails in part. The Board majority found no favour with the union's argument that the oral reprimand and the suspension constituted a double penalty. Nor, on the facts, did the Board majority accept the union's argument that there was bad faith displayed on the part of the employer. However, after reviewing the employer's discipline penalty guidelines, the Board majority did agree with the union's contention that a two-week suspension was too severe in light of the circumstances, and reduced the penalty to two days.

DISSENT:

One member of the Board dissented, arguing that the grievor's mistake was so minor a matter, on the facts, that there was no justification for any suspension.

81-09: Halifax Civic Workers, Local 108 - AND - City of Halifax

Judge J. A. MacLellan, Chairman, E. Durnford, J. Ross
B. Allen for the employer
C. MacDougall for the union
May 12, 1981

ISSUES: Leaving work without permission (7:3130); Progressive Discipline (7:4422)

CIRCUMSTANCES: The Grievor was suspended four days for leaving work temporarily without permission. He visited a friend with two other employees during working hours. Those two employees were given warnings. The Grievor had previously been suspended one day for a similar occurrence.

AWARD: The Grievance succeeds in part. The suspension is reduced to two days in keeping with the Employer policy of progressive discipline.

81-10: Canadian Union of Public Employees, Local 1392 - AND - Governors of Dalhousie College and University

R. Lorne MacDougall, Q. C., Chairman, R. Clarke, D. H. McDougall
E. B. Durnford for the employer
A. K. Cunningham for the union
April 7, 1981

ISSUES: Absence from Work (7:3100); Leaving Work (7:3130); Penalties set by Collective Agreement (7:4100)

CIRCUMSTANCES: The Grievor was suspended for three days after his supervisor was unable to find him at his work place although he made three tours of the area in an effort to locate the Grievor. The Grievor had previously left his work place and on a prior occasion had received a written warning. The collective agreement provided that in the second instance of "absence from work" without permission a suspension of three days was justified.

AWARD: The grievance fails. Although absence from the work site does not amount to an "absence from work" as contemplated in the agreement, the conduct of the Grievor in this case was sufficiently improper to merit the discipline.

81-11: Halifax Police Patrolmen's Association, Local 110, P.A.N.S. - AND - City of Halifax

R. Lorne MacDougall, Q. C., Chairman, C. MacDougall, E. B. Durnford, dissenting
Barry Allen for the employer
Bruce Evans for the union
March 2, 1981

ISSUES: Call-in pay (8:3400); Interpretation of the Collective Agreement (4:2100)

CIRCUMSTANCES: The grievor was suspended pending the outcome of a criminal prosecution against him, with pay and allowances. During the course of the suspension, the Grievor attending court for 52 hours during time which, according to the schedule which he would otherwise have been following, he would have been off-duty. The collective agreement provided that officers were to be compensated for off-duty call-out time at a minimum of four hours pay per court appearance, during off-duty time.

AWARD:

The grievance succeeds. The only issue is whether at the relevant times the Grievor was off-duty, which was clearly the case.

DISSENT:

The Grievor was not "off-duty" as contemplated by the collective agreement during the relevant time of the court appearances, because an employee could not be off duty unless he were before and after on-duty. Accordingly, the Grievor ought to have claimed for all court appearances, since he was "off-duty" during the shifts he might have worked as those during which he would not have.

81-12: Nova Scotia Nurses Union - AND - All Saints Hospital

Brian Langille, Chairman, Donald H. McDougall, Al Cunningham (separate decision)
April 16, 1981

ISSUES: Preliminary Objection, Time Limits, Mandatory or Directory (2:3128)

CIRCUMSTANCES: The Employer alleged that the Union's grievance had not been processed within the time limits or according to proper procedure as outlined in the collective agreement. The grievance was not filed within the ten day time limit. Additionally, step 1 of the procedure was ignored, as the grievance was not discussed with the "immediate management supervisor" as required by the collective agreement. The agreement provided that an employee "shall within ten (10) days of the discovery ... of the incident ... first discuss the grievance with her immediate supervisor ..." but provides no express remedy for failure to comply with the time limit.

AWARD: The objection is sustained. The grievance fails. Once a grievance has been initiated, the employer is put on notice and then the failure to meet a time limit should not rob the employee of his day in court. However, when the time limit relates to the initiation of the grievance, then the employer is entitled to rely upon the finality of the passing of the time as set out in the limit. Merely because no consequences of non-compliance were spelled out does not make the language directory only.

81-13: United Food and Commercial Workers, Local 642 - AND - Canso Seafoods Limited

T.J.K. Gillis
Ron Pink for the union
Gregory I. North for the employer
March 2, 1981

ISSUES: Management Rights (5:0000); Skill and Ability (6:3000)

CIRCUMSTANCES: The Grievor alleged that he was paid at a lower rate than other employees doing the same work. The employer adduced evidence that the Grievor was not able to perform the work of journeyman to the degree of his co-workers, and while he did perform some of the same duties, he did not do sufficiently advanced work to entitle him to the higher rate. No job descriptions were given in the collective agreement, and the different pay levels were to be attained according to seniority, ability and qualifications.

AWARD: The grievance fails. Management had the right to promote its employees according to their capabilities and competence. Its assessment in this case cannot be challenged.

82-14: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Local 720 - AND - Volvo Canada Limited

81-14 (continued)

Judge J. A. MacLellan
J. Merrick for the employer
L. Sheffe for the union
April 14, 1981

ISSUES: Policy grievance (2:3120, 2:3124); Procedural Limitations on Disipline (7:2100)

CIRCUMSTANCES: The Grievor was disciplined on January 14 for an incident which occurred on the previous December 23, 1980. The collective agreement required that notice of discipline be given within 14 days of knowledge of the incident giving rise to the discipline. The Grievor's action had caused an injury. Although the company knew of the injury, it learned of the employee's culpability on January 14. The employer raised the preliminary objection that the grievance was characterized as a policy grievance although it was in reality an individual grievance since it concerned only the Grievor.

AWARD: The Greivance fails. The incident which gave rise to the discipline was not the injury but the grievor's part in causing the injury and discipline occurred within the time limit from the employer gaining knowledge of that fact. The preliminary objection was overruled on the grounds that policy and individual grievances are not mutually exclusive and this grievance can properly be considered a policy grievance.

81-15: International Association of Fire Fighters, Local 268 - AND - City of Halifax

Brian Langille
W. Spicer for the union
B. Allen for the employer
April 22, 1981

ISSUES: Interpretation of Collective Agreement (4:2100); Vacation Entitlement (8:3230)

CIRCUMSTANCES: The Grievors alleged that holiday pay had wrongly been withheld. The Grievors began work on January 1, 1966 and completed their 15th year of service on December 31, 1980. The collective agreement provided that an additional day's pay would be paid to employees who had completed 15 years service. It also provided that where a qualifying year is reached during a calendar year that holiday entitlement was to be calculated as if the qualifying year were completed on December 31 of the preceding year. The Union argued that the day's pay was owing for 1980.

AWARD: The Grievance succeeds. Since the qualifying year was reached during 1980 (December 31, 1980), it is deemed to have been reached on December 31, 1979, and therefore, the additional day's pay is due to the Grievors in 1980.

81-16: Industrial Union of Marine and Shipbuilding Workers, Local 13 - AND - Halifax Industries Limited, Dartmouth Marine Slips

W. C. Kennettle
J. Bell for the union
D. Carver for the employer
March 17, 1981

81-16 (continued)

ISSUES: Discipline and discharge, insubordination (7:3610, 7:3612)

CIRCUMSTANCES: The Grievor was discharged for refusing to carry out duties as directed by the Foreman. The Grievor had refused to carry out these clean up duties on previous occasions. The Grievor refused the order to clean up and told the Foreman that he "might as well fire" the Grievor.

AWARD: The Grievance fails. Insubordination is one of the most serious of industrial penalties. There are no mitigating circumstances which would justify altering the penalty of discharge.

81-17: United Steelworkers of America, Local 4702 - AND - Ferguson Industries Limited

Judge Nathan Green
W. S. Ruck for the union
Gregory I. North for the employer
March 23, 1981

ISSUES: Interpretation of the Collective Agreement (4:2100); Overtime Assignment (5:3222)

CIRCUMSTANCES: The Union grieved an allegedly improper overtime assignment. The Grievor, a rigger, was usually required for major lifts of engine parts as required to repair ships. The collective agreement stated that maximum flexibility was required among the workforce, and that minor lifts were to be carried out by all classifications. A lift was required in a situation where the job had to be completed in a short time. Had the Grievor been called in, the work would have been delayed a day. The lift was completed in 25 minutes.

AWARD: The grievance fails. The lift could not be said to be a heavy lift as contemplated in the collective agreement in the circumstances.

81-18: Nova Scotia Teachers Union - AND - Municipal School Board, Municipality of the County of Halifax

T. J. K. Gillis
Blaise MacDonald for the union
A. W. Cox for the employer
February 17, 1981

ISSUES: Interpretation of collective agreement (4:2100); Compulsory Arbitration

CIRCUMSTANCES: A clause in the collective agreement required that teachers be permitted six 40 minute periods for each cycle of six "instructional days". The clause was imposed by compulsory arbitration. The Employer refused to comply with the clause for grades one, two and three. It argued that the clause was ambiguous because the term "instructional day" was not defined.

AWARD: The grievance succeeds. The Employer was ordered to comply with the clause. A clause established by compulsory arbitration is as binding as one negotiated by the parties. By virtue of having implemented the clause for other grades, the Employer could not argue that the clause was too ambiguous to in-

81-18 (continued)

terpret.

81-19: Canadian Union of Public Employees, Local 1711 - AND Queens General Hospital Association, Inc.

S. Bruce Outhouse, Chairman, H. McInnes, Q.C., G. McConnell
Blaise MacDonald for the union
Gregory North for the employer
April 3, 1981

ISSUES: Resjudication (1:3000, 2:3220); Interpretation of the Collective Agreement (4:2100); Work on day of Holiday (8:3130)

CIRCUMSTANCES: The union grieved the Employer; interpretation of the following clause: "If an employee's normal work day is on a holiday, he will be compensated by being paid time and one half for all hours worked in addition to his regular day's pay... or at his option another day off as mutually agreed ." The Union claimed that an employee was thereby entitled to time and one half for the day worked plus a day off. The Employer interpreted the clause to entitle a day's pay, plus a day off (or an additional payment of time and one half for the hours worked in that day).

AWARD: The grievance fails. The words, "in addition to his regular day's pay," clarifies the fact that when the employee is paid time and one half, it is surplus to the pay which was forthcoming in the normal course of work. There is a clear preponderance in favour of this meaning. (The employer made a preliminary objection of res judicata because of an arbitral award based on the same clause in an agreement between a different local of the Union and a different Employer. This was denied because the parties were different.)

81-20: Police Association of Nova Scotia - AND - National Harbours Board

R. Lorne MacDougall, Q.C., Chairman, G. O. Robinson, Charles MacDougall
D. McDougall and J. Pink for the employer
B. Evans for the union
March 27, 1981

ISSUES: Discharge, Work Performance, Incompetence (7:3510)

CIRCUMSTANCES: The Grievor was discharged on the grounds that his work as a constable was unsatisfactory. Evidence was adduced that a four and one half year period the Grievor was difficult to supervise, failed to follow instructions well, was difficult to get along with, was too aggressive and argumentative and had little or no respect for his superior officers. In the year prior to discharge, the Grievor had challenged his superiors openly, frequently questioning their decisions and had submitted a written complaint of the matter .

AWARD: The grievance fails. A police force is somewhat of a para-military organization and requires a disciplined group working to a considerable ex-

81-20 (continued)

tent as a team. The Grievor is unable to act as a member of such a team. As such, discharge is not so much a disciplinary matter as a recognition of the Grievor's inappropiateness for this work.

81-21: Canadian Brotherhood of Railway, Transport and General Workers, Local 606 - AND - Dartmouth General Hospital and Community Health Centre

Brian Langille, Chairman, R. Hill, M. J. MacPherson
R. Pink for the union
Gregory North for the employer
April 16, 1981

ISSUES: Preliminary Objection, Jurisdiction where Grievor Withdraws (2:3122, 2:3124)

CIRCUMSTANCES: The Employer made a preliminary objection that the Board lost jurisdiction because the Grievor had indicated a desire to withdraw his grievance in a letter to the Union.

AWARD: The preliminary objection is overruled. The Union is the occlusive bargaining agent for the employees of the employer. The Grievor has no authority to direct the Union's conduct of the grievance procedure and the Union has a real interest in the issues raised by a grievance it has chosen to take to arbitration.

81-22: Hotel and Restaurant Employees and Bartenders International Union, Local 662 - AND - Chateau Halifax

D. Merlin Nunn, Q.C.
E.B. Durnford for the employer
G.J. McConnell for the union
February 25, 1981

ISSUES: Culminating Incident (7:4310); Sleeping on the job (7:3570)

CIRCUMSTANCES: The Grievor was discharged for generally being unsatisfactory as an employee. Over a six and one half year period, the Grievor's work record was marred by 132 entries for absenteeism, incompetence and violation of plant rules, warning letters for absenteeism, insubordination, lateness, and watching television on the job, verbal warnings for watching television, and suspensions of absenteeism, failure to report, bad workmanship and slow work. These incidents occurred at least once in every month of employment. The incident resulting in the discharge was finding the Grievor asleep on the job in the guest room bed.

AWARD: The grievance fails. While sleeping on the job might by itself be no cause for discharge, in consideration of the Grievor's previous work record, the discipline is justified.

81-23: Duplicate Decision

81-24: Dalhousie Staff Association - AND - Governors of Dalhousie College and University

R. Lorne MacDougall, Q.C., Chairman, A. K. Cunningham, G. North, dissenting
E.B. Durnford for the employer
G.J. McConnell for the union
February 26, 1981

ISSUES: Preliminary Objection, Bias (3:1100, 1:5210)

CIRCUMSTANCES: In the course of the arbitration process, the employer objected to the union nominee to the Board on the grounds of bias or a reasonable likelihood of bias. The union nominee was the business agent of a union with frequent dealings with the employer, including negotiations, arbitrations and a strike against the employer.

AWARD:

The objection fails. The onus is on the employer to show a "real likelihood" of bias is present. Generally, membership in one union does not disqualify that person from acting in a matter related to another union. Any bitterness towards the employer of the nominee caused by the strike had been dissipated by the time between the strike and this proceeding. (two years)

DISSENT: The nominee's ongoing relationship with the employer was adversarial.

81-25: Retail, Wholesale and Department Store Union, Local 596 - AND - Co-op Atlantic Building Supplies Department Sydney

Frank L. Elman, Q.C., Chairman, G. MacIntyre, E. Buist
T. Pickford for the union
G.S. Khattar for the employer
March 4, 1981

ISSUES: Skill and Ability (6:3210); Training Period (6:3230); Burden of Proof (3:2413, 6:3200)

CIRCUMSTANCES: The union contended that the Grievor ought to have been able to bump an employee rather than be laid-off. The collective agreement provided that lay-offs were to occur on the basis of seniority consistant with the ability of the employee to perform the work. The Grievor had served as a substitute over two years in the job which was the subject of the grievance, such that he was able to do the majority of the work.

AWARD: The grievance fails. The Grievor has not established that he has sufficient present ability to do the work without a training period. He is only entitled to a training period if it is provided for in the agreement.

81-26: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 56 - AND - W. M. Walker Plumbing and Heating Limited

M. J. Veniot
B. MacDonald for the union
S. Nickerson for the company
March 6, 1981

81-26 (continued)

ISSUES: Bargaining unit (5:1126)

CIRCUMSTANCES: The union contended that the employer had failed to pay certain employees at the proper wage rate and had failed to make the remittances to the union as required under the collective agreement. The only issue of dispute was as to the union status of a union member who was related to a company official. He was paid a salary and waived any claim to additional wage claim under this proceeding. He performed tasks which were in part supervisory functions.

AWARD: The company was ordered to pay wages and remittances according to the agreement, including remittances on behalf of the employee alleged to be outside the unit. The evidence established that he was at most a "working foreman" and therefore within the unit.

81-27: Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927 - AND - O'Toole's Transfer Limited

F.B. William Kelly
D. Beuree for the union
J.V. MacDonald for the employer
March 6, 1981

ISSUES: Preliminary Objections, Form of Grievance (2:3122); Time Limits (2:1100, 2:3210, 2:3130); Bargaining Union work Performed by Non-unit Employees (5:1400)

CIRCUMSTANCES: The union alleged that the employer allowed a supervisory employee to do unit work, thus forcing the lay-off of the Grievor for three days. The union's evidence was tendered with respect to warehouse operations generally. There were four preliminary objections: 1) the Grievor was not present; 2) the Grievor did not sign the grievance; 3) the grievance was submitted by the shop steward rather than the Grievor; and 4) the written grievance was not submitted within the three day time limit.

AWARD: The preliminary objections are all overruled. The grievance fails. There is no requirement for the Grievor to be present. The second and third objections were technical irregularities only and consonant with previous practice of the parties. The time limit was not met because of the unavailability of the employer's president to accept it. Additionally, by proceeding with a consideration of the grievance the employer waived the time limit. The grievance fails because the union led no direct evidence on the issue of the work performed by the supervisor on the days in question.

81-28: United Brotherhood of Carpenters and Joiners of America, Local 2165 - AND - A.R. Hemming Building Systems Limited

D. Merlin Nunn, Q.C., Chairman, D. Hood, T. MacQuarrie, dissenting
E.B. Durnford for the employer
R.A. Pink for the union
February 16, 1981

ISSUES: Work Performance, Incompetence (7:3510)

CIRCUMSTANCES: The Grievor was dismissed for failing to meet production stan-

81-28 (continued)

dards. He was conscientious, congenial, co-operative and respectful of superiors. He was never told that his work effort was in need of improvement. The evidence respecting production quotas was subject to several qualifications as to its accuracy in establishing work ability, due, inter alia, to material shortages and to the fact that work was done in teams.

AWARD: The grievance succeeds. While management has the right to set standards and discipline those who refuse to meet them and lay-off those who are physically or mentally unable to meet them, it has not been established here that the Grievor was an incompetent employee in any respect. The employer has not discharged the onus of proving its allegations sufficient to support taking any action against the Grievor.

81-29: Canadian Union of Public Employees, Local 3010 - AND - Children's Aid Society

Charles O'Connell, Chairman, A. MacLeod, R. Campbell
M. Hikl for the union
B. Boudreau for the employer
March 11, 1981

ISSUES: Organization of Workplace (5:0000); Job Posting (5:2520); Discrimination for Union Activity (5:2300)

CIRCUMSTANCES: The union filed two separate grievances: 1) Three part-time employees were required to begin full-time work. The union claimed that this was demanded because of the Grievor's union activities. The employer stated that the full-time work was required in order to fill the work load of an employee who had left. 2) Four Grievors were transferred or reassigned work after a strike had been settled. The collective agreement required that posting be carried out for new positions, vacancies, promotions or transfers. It also stated that an employee appointed to a position for which he has not applied can grieve the appointment at which time the employer must show just cause for the appointment. The employer argued that the latter clause established that posting was not required for arbitrary transfers.

AWARD: 1) The first grievance fails. The employer has the unfettered right to change the working hours of part-time workers by virtue of the management's right provision of the agreement. 2) The second grievance succeeds. The provisions of the agreement must be read together. It is clearly contemplated that all transfers must be posted and then offered to the most senior applicant with the requisite ability.

81-30: Hotel and Restaurant Employees and Bartenders International Union, Local 662 - AND - The Hotel Nova Scotian

Judge J. A. MacLellan
G. Wheatley for the employer
H. Martell for the union
March 13, 1981

ISSUES: Discharge and Discipline; Leaving Work without Permission (7:3130); Burden of Proof in Discipline Cases (3:2411, 3:2500, 7:2300)

81-30 (continued)

CIRCUMSTANCES: The Grievor was discharged for leaving work without permission. The Grievor maintained that she had requested permission to leave work. The supervisor stated that the Grievor had not asked to leave. The work load was very light and the Grievor was not required. The Grievor did not sneak away, but waited in the lobby for a taxi.

AWARD: The grievance succeeds. The onus of proof is on the employer in a discharge or discipline case. The Board accepted the evidence of the Grievor, who was reinstated with full compensation.

81-31: Canadian Union of Public Employees, Local 759 - AND - City of Sydney
T.J.K. Gillis, Q.C.
B. MacDonald for the union
M.G. Whalley for the employer
January 30, 1981

ISSUES: Contracting Out (5:1300); Prior Award (2:3220)

CIRCUMSTANCES: The union alleged that the employer violated the collective agreement by contracting out work while union members were on lay-off. Evidence was adduced that certain types of work had customarily been contracted out. The employer also argued that a prior arbitration award had decided that contracting out similar work was permissable. That award involved short-term projects which would have jeoparized the laid-off employees U.I.C. benefits had they accepted short-term work.

AWARD: The grievance fails. The work contracted out was not unit work. The prior award is not applicable here, because of the different circumstances involved. It decided only that the employer could contract out work as short-term projects.

81-32: United Steelworkers of America, Local 4122 - AND - Robb Engineering

Judge J.A. MacLellan
J. Merrick for the employer
R. Young for the union
March 3, 1981

ISSUES: Discrimination (7:4414)

CIRCUMSTANCES: The Grievor alleged that the employer discriminated against him for participation in union affairs. After his reinstatement following an arbitration award the Grievor was involved in three disputes: 1) the employer refused to promote the Grievor according to his seniority; 2) the employer refused to clear the Grievor's record following the initial arbitration award; 3) the employer underpaid the Grievor for the compensation due him under the award. In each of these cases, following grievances, the employer settled the dispute to the Grievor's satisfaction.

AWARD: While there is no discrimination for union involvement, the company has clearly misunderstood the effect of the reinstatement of the Grievor.

81-33: Hotel and Restuarant Employees and Bartenders International Union, Local 662 - AND - The Hotel Nova Scotian

Judge J. A. MacLellan
G. Wheatley for the employer
H. Martell for the union
March 13, 1981

ISSUES: Work assignment to employees outside unit (5:1400)

CIRCUMSTNACES: The Grievor alleged that the employer had replaced her position with an employee in a supervisory position contrary to the agreement. The agreement allowed such a replacement on an occasional and necessary basis according to the demands of service but not so as to eliminate a scheduled unit position. The employer claimed that it placed a supervisor in the position in view of the slow business in winter months.

AWARD: The grievance succeeds. The wording of the agreement was clear and unambigous. The employer was not entitled to regularly schedule a supervisor in a scheduled position.

81-34: Halifax Longshoremen's Association, Local 268, I.L.A. - AND - Maritime Employees Association

R. Lorne MacDougall, Q.C.
G. Collier for the employer
G. McConnell for the union
Februray 9, 1981

ISSUES: Interpretation of Collective Agreement (4:2100)

CIRCUMSTANCES: The employer grieved the allegedly wrongful interference of the union's assistant business agent in a dispute at the work site over the interpretation of the agreement. The agent insisted that additional employees be called in to do certain work. The agreement stated that the business agent would not interfere with the work of employees nor with management's exercise of its rights. The employer contended that the incident was a "work and grieve" situation. The union argued that the "assistant" business agent was not bound by a term of the agreement which restricts the activities at the work place of the business agent.

AWARD: The grievance fails. While work was interfered with, this was done by the assistant business agent. The language, while creating an anamoly, does not produce absurd results and so its ordinary meaning should be applied.

81-35: United Steelworkers of America, Local 4883 - AND - Enheat Limited

R. Lorne MacDougall, Q.C.
R. Young for the union
H. Morrison for the company
February 13, 1981

ISSUES: Skill and Ability (6:3210)

CIRCUMSTANCES: The Grievor alleged that the employer violated the collective agreement by refusing to select him for a posted position. The agreement required that "when qualifications and ability to perform satisfactorily the normal require-

81-35 (continued)

ments of the job are equal" seniority would prevail. The Grievor had previously performed the job. The employer stated that the job required leadership qualities, which were possessed to the required extent only by the successful applicant.

AWARD: The grievance fails. The test is whether the Grievor had qualifcations and ability equal or greater than those of the successful applicant, rather than whether he had qualifications and ability required to perform the job.

81-36: United Steelworkers of America, Local 8202 - AND - Enheat Limited

Lorne O. Clarke, Q.C.
R. Young for the union
H. L. Morrison for the employer
February 26, 1981

ISSUES: Discipline, Refusal to obey Instructions (7:3610, 7:3612)

CIRCUMSTANCES: The union grieved the employer's decision to reduce the parking space available to bargaining unit members in the parking lot in front of the plant. The Grievor was suspended for one week for parking in a location reserved for another employee of the employer. The agreement provided that rights and privileges previously enjoyed by the employees in the bargaining unit were continued unless it was mutually agreed to alter them. Four parking spaces were removed from the general parking designation.

AWARD: The grievance succeeds in part. While parking is a privilege and thereby subject to the agreement, sufficient parking continued to be made available. The company can, therefore, continue to restrict parking as it has done. However, the week's suspension was excessive and is substituted by a written reprimand.

81-37: The International Association of Fire Fighters, Local 268 - AND - The City of Halifax

S. Bruce Outhouse
W. Wylie Spicer for the union
B.S. Allen for the employer
Februray 12, 1981

ISSUES: Probationary Employees (7:5000, 7:5020, 2:1100)

CIRCUMSTANCES: The union grieved the discharge of the Grievor, who was a probationary employee. The collective agreement provided that probationary employees could not grieve dismissal. The union argued that the agreement violated s. 40(1) of the Trade Union Act, which provides that every agreement must provide a mechanism for final settlement of differences between the parties. The employer moved the preliminary objection that the dismissal was not arbitrable.

AWARD: The objection fails. The discharge is arbitrable. Probationary employees can have "differences" with the employers within the meaning of the Trade Union Act.

81-38: International Brotherhood of Electrical Workers, Local 625 - AND - Easco Electric Limited

Brian Langille
R. Pink for the union
J. Plowman for the employer
February 19, 1981

ISSUES: Stare decisis, Res judicata (1:3000); Prior Award (2:3220)

CIRCUMSTANCES: The union alleged that the employer should be paying the industrial rate rather than the commercial rate. The agreement provided that the higher rate was applicable on all jobs on plants which produced certain goods "or any other type of construction project which has an original accepted tendered amount of $750,000 or more electrical value". The issue was whether the rate applied to jobs on plants as named and also on jobs of the tendered amount or whether the rate only applied to jobs or plants as named which exceeded the tendered amount. In a previous arbitration between the same parties, Richard, J., decided in favour of the latter position.

AWARD: The grievance fails. A prior award should only be reversed if it is manifestly wrong. The decision of the previous arbitrator was quite plausible, whether or not this arbitrator would have reached the same conclusion.

81-39: Metro Authority Employees' Association - AND - The Metropolitan Authority of Halifax, Dartmouth and the Municipality of the County of Halifax

S. Bruce Outhouse
G. North for the employer
E.B. Durnford for the union
February 19, 1981

ISSUES: Discrimination, Age (6:3360); Promotion, Skill and Ability (6:3210, 6:3230)

CIRCUMSTANCES: The Grievor contended that the employer wrongly rejected his application for the posted job of spare tractor trailer driver. The employer refused to grant the position to the Grievor for two reasons: 1) as the Grievor was under 25, the employer's insurance premiums would increase; and 2) the Grievor was medically unfit. The collective agreement provided that no discrimination due to age was permitted, and that promotions were to be awarded according to seniority, subject to a sixty day training period. The Grievor had on two occasions lost consciousness in accessive heat. Three doctors testified that the Grievor was medically fit for the posted job.

AWARD: The grievance succeeds. The Grievor's age cannot be considered, as this amounts to discrimination. The onus is on the employer to establish medical unfitness, in the face of the promotion provision of the agreement. That burden of proof was not discharged.

81-40: International Brotherhood of Electrical Workers, Local 625 - AND - Dawcoelectric Limited

81-40 (continued)

S. Bruce Outhouse
M. Brinton for the employer
R.A. Pink for the union
February 17, 1981

ISSUES: Super seniority (6:1130); Interpretation of Collective Agreement, Intention of Parties (4:2100)

CIRCUMSTANCES: The union grieved that the employer laid off the job steward prior to that time provided for in the agreement. The agreement stated that the steward was to be the next to last men laid off. The employer hired three journeymen and an apprentice and laid off the steward second, arguing that an apprentice was not a "man" for the purposes of that term of the agreement.

AWARD: The grievance succeeds. There is nothing in the agreement to suggest that the word "man" is to be given a restricted meaning. Throughout the agreement the word is used to denote both apprentices and journeymen. Where a difference is intended it is expressly described.

81-41: Correction Officers Association of Nova Scotia - AND - Metropolitan Authority of Halifax, Dartmouth and Halifax County

Lorne O. Clarke, Q.C., Chairman, B.M. Nickerson, G.J. McConnell
E.B. Durnford for the union
T.P. Donovan for the employer
February 12, 1981

ISSUES: Limits to Arbitration of Grievances: Death of Grievor (2:3110)

CIRCUMSTANCES: The Grievor was suspended, and in the course of the grievance procedure, he died. The employer raised the preliminary objection that the grievance could not proceed to arbitration in these circumstances.

AWARD: The preliminary objection fails. As long as the grievor was employed at the time the grievance arose the fact that he has ceased to be an employee does not render the grievance "unarbitrable". For example, the union may seek relief on behalf of the estate of the grievor.

81-42: United Brotherhood of Carpenters and Joiners of America, Local 83 - AND - Arrow Building Corporation Limited

Brian Langille
Gerald McConnell for the union
Eric Durnford for the employer
January 23, 1981

ISSUES: Effect of the Certification Process in the Construction Industry (1:1000, 1:3000)

CIRCUMSTANCES: The union grieved the failure of the employer to pay the appropriate rate of salary. The employer paid a wage lower than the union rate and suggested

81-42 (continued)

that certain of the job functions of the employees, not being work within the jurisdiction of the union, was not subject to the union rate.

AWARD: Certification does not entitle the bargaining agent to bargain with respect to union work but rather with respect to the terms of the employment relationship of the employer and a group or unit of employees. The contract calls for a wage of a stated amount for work performed by employees who are in the named union. While organization may depend upon craft divisions, collective bargaining occurs outside of that division. The grievance succeeds.

81-43: Canadian Union of Public Employees, Local 1392 - AND - Governors of Dalhousie College and University

Judge J. A. MacLellan, Chairman, M. Scott, D. H. McDougall, dissenting
B. MacDonald for the union
E. B. Durnford for the employer
January, 1981

ISSUES: Discipline and Discharge, Use of Drugs, Burden of Proof (7:2300)

CIRCUMSTANCES: The Grievor was discharged by the employer after his foreman had seen him puffing on what appeared to be a marijuana cigarette. The person who offered the Grievor the cigarette testified that the substance was marijuana, under protection of the Canada Evidence Act. The employer's rules provided for discharge for being found under the influence of drugs or alcohol. The Grievor denied having puffed on the cigarette.

AWARD: The grievance succeeds in part. The board found that the substance was consumed and was marijuana, although no analysis was done. The penalty was reduced to a two-month suspension in view of: 1) lack of pre-meditation, 2) the minor degree of influence which the drug would have had, 3) the record of the employee, 4) a three day suspension given to two other employees of the employer for drunkenness.

DISSENT: McDougall, dissenting, would uphold the discharge because of the continued denial of wrong doing by the Grievor.

81-44: Canadian Union of Public Employees, Local 933 - AND - The City of Sydney

R. Lorne MacDougall, Q.C.
M. G. Whalley, Q. C. for the employer
M. Hikl for the union
January 5, 1981

ISSUES: Interpretation of the collective agreement (4:2100)

CIRCUMSTANCES: The Grievor was reinstated in the employ of the employer by an arbitral award, as he had been dismissed because of a change in the employer's operations, which was forbidden by the collective agreement. The agreement also provided that no reduction in earnings would occur by virtue of such a change. The Grievor's new position in the unit was at a salary level otherwise lower than his previous position which had been discontinued. By virtue of the agreement, he received the higher rate. The

81-44 (continued)

Grievor grieved the failure by the company to apply a nine percent raise to his salary when a new agreement was executed.

AWARD: The grievance fails. The collective agreement only protected the Grievor's wages to the amount he received prior to his job being discontinued.

81-45: Industrial Union of Marine and Shipbuilding Workers of Canada, Local 24 - AND - Atlantic Bridge Company Limited

Lorne O. Clarke, Q.C.
J.K. Bell for the union
J.D. Plowman for the employer
January 5, 1981

ISSUES: Contracting Out (5:1300, 5:1400); Role of Arbitrator

CIRCUMSTANCES: The union alleged that the employer contracted out work contrary to the collective agreement by employing two carpenters to work on a cabinet, which work was not normally performed by the unit, but parts of which were able to be performed by unit members. The agreement prohibited contracting out where the work could be done on time by the unit employees.

AWARD: The grievance succeeds in part. Although the whole of the project was not typically carried on by the unit members, that portion of the work which was able to be carried out by them ought to have been done by them. The arbitrator refused to give a set of guidelines for the future application of the contracting-out clause as requested by the parties,

81-46: Kentville General Workers Union, Local 301 - AND - T.P. Calkin

Judge J. A. MacLellan, Chairman, J. Hockin, G. Parker
R. Street for the employer
G. North for the union
January 15, 1981

ISSUES: Bargaining unit work (5:1200, 6:2000); Employees outside unit (5:1400)

CIRCUMSTANCES: The union contended that the employer had reduced the bargaining unit improperly by assigning some management functions to an employee, thereby alleging that she was a non-unit employee. Her title was "Assistant Branch Manager". The employee stated that 75 to 85 per cent of her job consisted of direct selling and serving customers.

AWARD: The grievance succeeds. The issue was whether the job duties were such as to bring the employee within the scope of the unit, regardless of her title. By rearranging the management functions, the employer failed to keep within the framework of the collective agreement.

81-47: Dartmouth Firefighters Association, Local 1398, I.A.F.F. - AND - City of Dartmouth

81-47 (continued)

Lorne O. Clarke, Q.C.
G.J. McConnell for the union
M. Moreash, L. Cohen for the employer
January 15, 1981

ISSUES: Overtime (5:3220, 2:1423, 5:3240)

CIRCUMSTANCES: The union grieved the failure by the employer to follow the call-in procedure outlined in the collective agreement for filling overtime requirements. The position of dispatcher was required to be filled. The overtime list was exhausted without filling the shift, although the Grievor, who was requested to work, indicated that he would work the shift as a firefighter if a member of the shift worked as dispatcher. Eventually, a member of the shift worked as dispatcher, but the position as firefighter was filled without resort to the call-in list. The Grievor contended that in these circumstances he should have been offered the shift.

AWARD: The grievance succeeds in part. The employer violated proper procedure by failing to resort to the call-in list after a dispatcher was found in the regular shift crew. However, as the Grievor was not first on the call-in list, he cannot claim to be entitled to the work.

81-48: Labourers' International Union, Local 1115 - AND - Alder Point Construction Limited

Charles O'Connell
T.J.K. Gillis, Q.C., for the employer
Alex Tomko for the union
February 10, 1981

ISSUES: Bargaining unit work (5:1200); Quantum of Compensation (2:1424, 5:1500)

CIRCUMSTANCES: The union claimed that employees who were not union members performed union work.

AWARD: The Grievors are entitled to pay equal to the amount which each would have worked had the work been properly assigned to them. In those cases where less than four hours work was available in a day, four hours pay will be awarded for that day pursuant to the agreement which provides that an employee who reports for work shall receive no less than four hours pay.

81-49: Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927 - AND - Atlantic Concrete Limited

Dennis Ashworth
Douglas Beuree for the union
Gregory North for the employer
February 5, 1981

ISSUES: Form of grievance (2:3122); Definition of vanancy (5:2510); Meal and travel allowance (8:3700)

81-49 (continued)

CIRCUMSTANCES: The union grieved the refusal of the employer to pay meal and travel allowance to a group of employees. The company posted positions which were filled by employees with seniority in the Halifax area. The jobs were for work in Kings County. The agreement provided that vacancies were to be posted and that meal and travel allowances were to be paid to employees "sent to another operating area". The employer argued that the new positions were not vacancies. The employer also argued that the form of grievance was improper, in that it referred to "all employees affected".

AWARD: The grievance fails. The form of grievance was that of a group grievance which was proper. The jobs were required to be posted as a vacancy included new work which required a greater number of employees. However, since no employee was "sent" to Kings County by the employer, no meal and travel allowance is payable.

81-50: Duplicate Decision

81-51: The Governors of Dalhousie College and University - AND - Canadian Union Of Public Employees, Local 1392

An application by Dalhousie University, before the Supreme Court of Nova Scotia, Trial Division, to quash and set aside the arbitration award of Judge J. A. MacLellan and Rene Quigley, majority decision, dated November 26, 1979.

Mr. Justice Peter Richard
Eric Durnford for the applicant employer
Blaise MacDonald for the respondent union
January 21, 1981

ISSUES: Error of law on the face of the record; Judicial review (1:5400, 1:5410, 1:5000)

CIRCUMSTANCES: The Grievor had successfully grieved the issue of the university's non-awardance of two paid sick days. He had argued that he had phoned the university's telephone recording device, as required, to inform his supervisor that he was sick and would be unable to work that day. The recording did not pick up his calls. In any event, the grievor admitted that he had phoned in only an hour or less before his shift was to start, whereas the collective agreement had stipulated a minimum of three hours. Nevertheless, the Arbitration Board majority upheld his grievance, holding that prior practice with other employees indicated that the practice of the university had not been to dock employees who had phoned in late. The university sought to quash the decision of the Arbitration Board majority on the grounds that an error of law on the face of the record had been committed.

AWARD: The Supreme Court granted an order quashing the Arbitration Board decision. Th Court ruled that in interpreting the collective agreement clause on sick pay in the manner that it did, it altered the terms of the agreement and imposed an obligation which was never agreed upon by the parties. This ruling was beyond the jurisdiction of the Board to make, hence, an error of law on the face of the record was committed.

81-52: The Halifax Civic Workers, Local 108 - AND - City of Halifax

81-52 (continued)

Judge J.A. MacLellan, Chairman, Eric Durnford, Joseph Ross
Barry Allen for the employer
Charles MacDougall for the union
June 3, 1981

ISSUES: Dismissal because of unwarranted absence from work (7:3130); Use of prior discipline record (7:4314)

CIRCUMSTANCES: The Grievor, a chauffeur, had left his assigned place of work to attend some personal matters. His vehicle was spotted by a supervisor outside of the assigned area and he was dismissed from work. The dismissal was based on a accummulation of warnings add short suspensions over the prior year for similar offences.

AWARD: The Grievance succeeds in part. In considering all of the circumstances, the Board majority concluded that the discharge was too severe, and substituted a suspension of seven months, being the time from the dismissal to the receipt of the arbitration award.

81-53: The Amalgamated Transit Union, Local 508 - AND - Halifax Transit Corporation

Lorne MacDougall, Q.C., Chairman, Eric Durnford, Joseph Ross
Ron Pink for the union
William MacInnes for the employer
July 31, 1981

ISSUES: Discipline re Probationary Employees (7:5000)

CIRCUMSTANCES: The Grievor, a probationary bus driver, had a rear-end accident while driving a transit bus. The company policy was that such an accident, save for mitigating circumstances such as mechanical failure, was grounds for immediate discharge for a probationary employee. The issue revolved around whether the standard set by the company was arbitrary or unreasonable.

AWARD: The grievance fails. The Board majority accepted the two-fold test that it must first assess the reasonableness of the standard imposed by the company and then determine whether the conduct of the probationary employee reasonably supports the conclusion that he or she is likely to prove to be an unsuitable employee. While there is an onus on the company to prove that there is cause for discharging a probationary employee, that cause need not be of the same form as required for a seniority-rated employee. On the particular facts of this case, the Board majority found that the standards set by the company for its probationary employees were not unreasonable or arbitrary, and that the Grievor's conduct - the rear-end collision - reasonably supported the conclusion that she would likely prove to be an unsuitable driver.

81-54: The Halifax Civic Workers, Local 108 - AND - City of Halifax

Lorne MacDougall, Q.C., Chairman, Eric Durnford, Joseph Ross
Gerald Goneau for the employer
Charles MacDougall for the union
July 30, 1981

81-54 (continued)

ISSUES: Suspension because of unwarranted absence from work (7:3130); Use of prior discipline record (7:4314)

CIRCUMSTANCES: The Grievor, a field labourer and chauffeur, was suspended from work for one day for unwarranted absence during a supervisor's inspection. At the time, the Grievor was shovelling snow, a job which in the circumstances required a degree of unsupervised trust and self-regulation. On an afternoon inspection, the supervisor failed to spot him for a period of time longer than an ordinary break would warrant. The resulting suspension was based, in part, on consideration of the Grievor's past discipline record, which included two prior warnings. In reply, the Grievor maintained that he was on the job for the entire time, except for a regular break period; his testimony was backed up by fellow employees, who saw him at work during the time in question.

AWARD: The grievance fails. The Board majority held that the employer was entitled to consider the Grievor's past discipline record. On the conflicting evidence presented, the Board majority placed particular weight on the testimony of the supervisor, and concluded that the Grievor took a longer break than he was entitled to.

81-55: Canadian Brotherhood of Railway, Transport, and General Workers Union, Local 606 - AND - Dartmouth General Hospital

Judge J.A. MacLellan, Chairman, Al Cunningham, Matthew MacPherson
Ronald Pink for the union
Gregory North, Terry Roane for the employer
June 2, 1981

ISSUES: Call-in on Statutory Holiday; Calculation of Holiday and Call-in pay (8:3140, 8:3400)

CIRCUMSTANCES: The Grievor, a hospital nursing aide, was called in to work on Boxing Day, which was a scheduled holiday for her. She worked for a little more than an hour and was paid on a calculation based on straight time and holiday pay. She grieved arguing that according to the collective agreement, she should be compensated by receiving a day off at a later date in addition to certain monetary benefits. The employer argued that the provision in question in the agreement does not come into play, since the Grievor was neither 'called to work', nor was the particular day 'a holiday which is on his normal day off'.

AWARD: The grievance succeeds. The Board majority held that the Grievor meet the pre-conditions of the provision in question, in that being 'called to work' does not contemplate the working of a full shift, and that 'normal day off' includes statutory holidays, even if they fall on a regular work day. The Board majority was satisfied that the provision in question provided an additional benefit to an employee who has his or her holiday interrupted by being called to work.

81-56: The Energy and Chemical Workers Union, Local 832 - AND - Atomic Energy of Canada

R. Lorne MacDougall, Q.C., Chairman, Edward Gravefell, Donald MacDougall
Eric Durnford for the employer
John Kane for the union
June 9, 1981

81-56 (continued)

ISSUES: Computation of Vacations (8:3220, 8:3230)

CIRCUMSTANCES: The issue here revolves around the determination of the anniversary date of an employee's length of service, for the purposes of calculating the period of entitlement for vacations. An employee with ten years of service, or more, is entitled under the collective agreement to four weeks of paid vacation. However, the employer and the union disagreed as to when the ten year service period would be completed. The union's position was that the relevant date was the tenth aniversary of the particular individual's job commencement date. The employer, on the other hand, argued that the relevant date was June 1st, the date stipulated in the collective agreement as the beginning of the vacation year. Nine union members were affected by the anomally of the employer's interpretaiton of the agreement, and grieved the issue.

AWARD: The grievance succeeds. Applying the literal language of the agreement, the Board unanimously found that the relevant date for purposes of calculating the employees' length of service would be the anniversary date of their commencing employment at the company.

81-57: United Food and Commercial Workers International Union, Local P-1157 - AND - Co-op Atlantic, Feed Plant

R. Lorne MacDougall, Q.C.
Ronald Pink for the union
Peter MacLellan for the employer
June 4, 1981

ISSUES: Seniority re lay-off and Bumping (6:2000, 6:2330)

CIRCUMSTANCES: The Grievor had been laid-off from his job as a labourer. An employee with less senoirity doing some of the same work was kept on. The Grievor argued that the seniority provisions in the collective agreement should have protected him. The employer's argument was that the Grievor had both a lower job grade level and was unable to demonstrate that he had the necessary skills and experience to perform the job of Quality Control, the position which the retained employee would have to perform.

AWARD: The grievance failed. The Arbitrator ruled that while the seniority provision in the collective agreement called for a 'reasonable familiarization period' for an employee with seniority in order to demonstrate whether he could satisfactorily acquire the necessary skills of a new position, the familiarization period was not an unqualified right of the employee. In order to be given a familiarization period, the employee must demonstrate that he has the minimum qualifications for the position. In the case at hand, the Arbitrator held that the Grievor had neither the necessary educational qualifications nor the ability to perform or acquire the skills for the job of Quality Control.

81-58: The International Brotherhood of Electrical Workers Local 1928 - AND - The Nova Scotia Power Corporation

Brian Langille
Merlin Nunn, Q.C., for the employer
Gerald McConnell for the union

81-58 (continued)

June 15, 1981

ISSUES: Severity of Disciplinary Penalty (7:4000)

CIRCUMSTANCES: The Grievor, a meter-reader, had been suspended for two days without pay for leaving work without permission to return home. She grieved the suspension, arguing that her work is largely unsupervised and self-regulatory and reasonable departures from work to fill a reasonably required need are, or at least ought to be, condoned. In the circumstances here, the Grievor returned home for some medication on her way to retrieve a forgotten meter book at the office, which was very close to her residence.

AWARD: The grievance succeeds. The onus in a discipline case such as this is upon the employer to establiish that it had just cause for the discipline handed out. The onus was not discharge. The Arbitrator held that in the circumstances of such an unsupervised job, reasonable departures from work on the ground of reasonable necessity are permitted. The act of 'going home' does not constitute a significantly different act from going to a washroom or searching for a lunch spot, when 'going home' is as reasonable a departure from the particular day's work route as the necessity to fill any other reasonably required need.

81-59: The United Steelworkers of America, Local 6516 - AND - Sydney Steel Corporation

Judge Nathan Green
Paul LePage for the union
Merlin Nunn for the employer
June 22, 1981

ISSUES: Computation of vacation and vacation pay (8:3230)

CIRCUMSTANCES: The two Grievors had been laid off for a period of several months and were paid their vacation pay based on a percentage of their total earnings of the contract year. They claimed that their vacation pay should have been calculated on the basis of seniority, with the number of weeks of paid vacation being dependent on the years of service; as such, a period of lay-off time would not affect the vacation benefits.

Thus, the issue was whether a person on lay-off who misses some employment is nevertheless entitled to a full vacation with the collective agreement's period of entitlement.

AWARD: The grievance fails. The Arbitrator held that on the wording of the collective agreement and in the manner in which the company prepared the entitlement sheets, the correct view is that vacation pay, unlike holiday pay, is earned by an employee's attendance at work and is not something which is ordinarily granted to someone who is not at work.

81-60: The United Steelworkers of America, Local 1231 - AND - Hawker Siddeley Canada Incorporated

81-60 (continued)

R. Lorne MacDougall, Q.C.
Robert Young for the union
John Howatson for the employer
June 10, 1981

ISSUES: Vacation benefits (8:3210); Error of Omission in the collective agreement

CIRCUMSTANCES: This was a group or policy grievance. By an error of omission, the collective agreement signed by the union and employer omitted the starting date for the vacation benefits. The employer claimed that the effective starting date of the benefits was in the second year of the agreement. The union argued that the effective starting date was the first day of the agreement's life.

AWARD: The grievance succeeds. The Arbitrator, after hearing considerable background evidence by both parties on the reasonable meaning to be given to the vacation benefits clause, looked to the plain language of the agreement. The agreement's use of the phrase "current year" clearly referred to the year in which the agreement was signed, which meant that the vacation benefits clause was to be effective from the starting date of the agreement.

81-61: The Nova Scotia Nurses Union, Halifax Infirmary Local - AND - Halifax Infirmary Hospital

R. Lorne MacDougall, Q.C., Chairman, Donald H. McDougall, John Kane, dissenting
Eric Durnford and others for the union
David Reynolds for the union
July 17, 1981

ISSUES: Paid sick leave (8:3320)

CIRCUMSTANCES: During her pregnancy, the Grievor, a full-time nurse, became ill with hypremesis gravidarum, an illness thought to be closely linked with pregnancy. As a result, the Grievor was unable to work during the early and middle months of her pregnancy. She was placed on maternity leave without pay, as provided for in the collective agreement, although she did not request this status. The Grievor subsequently requested sick pay for the time spent not working while she was ill. The request was refused by the hospital and a greivance was filed.

AWARD:

The grievance fails. The Board majority held pregnancy in the present collective agreement is a separate matter from sickness, and while a pregnant employee can, as of right, claim leave, it is to be without pay. The specific wording of the maternity leave clause in the collective agreement allows the hospital to require the pregnant nurse to stop work if "the state of the nurse's health becomes incompatible with the requirements of her job". The Board majority read this to mean that an illness directly related to a pregnancy does not qualify for sick leave pay under the collective agreement.

DISSENT: One member of the Board dissented. His argument was that an illness associated with a pregnancy was still an illness which gives rise to sick benefits in the absence of specific wording to the contrary. The dissenting member could find no such wording in the collective agreement, therefore, the only reasonable interpretation would be to grant pregnant employees the right to sick benefits.

81-62: Canadian Union of Public Employees, Local 2046 - AND - Cape Breton Development Corporation

Judge Robert Ferguson
Eric Durnford for the employer
James Crosby and others for the union
April 9, 1981

ISSUES: Theft (7:3310); Disciplinary Penalties (7:3314)

CIRCUMSTANCES: The Grievor took, without permission, a truckload of coal from the company's coal pile. He was fired, on the grounds of theft, and grieved the penalty as being too severe. The company argued that taking company property without permission was a fundamental breach of trust between the employer and the employee, and dissmisal was a reasonable penalty. They further argued that an Arbitrator should only substitute a different penalty from that of the employer if he is convinced that the employer has acted in an arbitrary, discriminatory or otherwise unreasonable manner under the circumstances. The union rebutted by pointing to the Grievor's previous unblemished and satisfactory work record, and to the current trend in arbitration jurisprudence of accepting rehabilitation, correction and individualization as the cornerstone of contemporary industrial discipline.

AWARD: The grievance succeeds. The disciplinary penalty was reduced from dismissal to demotion from the position of supervisor and a suspension without pay or seniority accumulation for six months. The Arbitrator disagreed with the company's argument on his ability to substitute for an employer's penalty; instead, he accepted that the test is that an Arbitrator may substitute a penalty as he considers just or reasonable in the circumstances, including the consideration of the Grievor's length of service, his past record, and, in the case of theft, the value of the goods involved. Further, the Arbitrator held that an isolated act of theft, aggravated dishonesty or untrustworthiness is not automatically, or, in the abstract, grounds for discharge. It was not unrealistic to think that some lesser form of sanction would not serve to deter the Grievor or his fellow employees from repeating an act of theft of company property.

81-63: The International Brotherhood of Carpenters and Joiners, Local 83 and 1392 - AND - E. and R. Construction Company Limited

Milton Veniot
Ronald Pink for the union
Ed Schofield for the employer
February 17, 1981

ISSUES: Owing of monies, in respect of union dues and pension and welfare contributions, by the company to the union; Nova Scotia - Legislative framework (1:1000, 1:3000)

CIRCUMSTANCES: The company, due to hard times, fell behind in its remittances to the union for union dues, pension and welfare contributions. The collection of these funds for the union was provided for in the collective agreement. The union sought an order directing the payment by the company of the funds in question.

81-63 (continued)

AWARD: The grievance succeeds. An order was granted directing the company to pay the funds owing to the union.

81-64: International Brotherhood of Electrical Workers, Local 625 - AND - Dawcolectric Limited

Brian Langille
Merlin Nunn, Q.C., for the employer
Gerald McConnell for the union

ISSUES: Computation of Travel Allowance (8:3700)

CIRCUMSTANCES: The Grievor, a journeyman electrician atthe Michelin Tire plant construction site, asked for and received one-half day off work in order to attend to family medical problems. After the doctor's appointment, he drove to the construction site and worked for the remaining half of the work day. According to the collective agreement, employees commuting to the work site received a travelling allowance 'per day worked'. The employer did not pay the Grievor a travelling allowance for the day in question, arguing that 'per day worked' meant a full day worked. The Grievor and the union contended that the phrase in question means that a commuting allowance is to be paid for each day that an employee works, regardless whether it is a full eight hour day.

AWARD: The grievance succeeds. The Arbitrator resolved the issue by looking to the purpose of commuting pay, which is to reimburse an employee for travelling expenses. The important point was that if an employee travels to a work site and works, he incurs those expenses whether he works a full day or not. Hence, 'per day worked' is to be read as referring to days upon which an employee has worked and not days upon which an employee has done a full day's work.

81-65: Canadian Union of Public Employees, Local 759 - AND - The City of Sydney

T.J.K. Gillis, Chairman, Linda Gallant, Daniel MacLeod
James Crosby for the union
M.J. Whalley for the employer
June 23, 1981

ISSUES: Work Assignments (Temporary Assignments) (5:2400); Past Practices, Estoppel (2:2200)

CIRCUMSTANCES: The Grievor claimed that management had violated provisions of the collective agreement by not paying the Grievor the foreman's rate while the Grievor was temporarily filling in for him. The Grievor alleged that it was implied by management at the time he was asked to take the foreman's job that he would get the higher rate, and in addition, that past practice indicated that he would receive that rate. The agreement specified that employees temporarily assigned would get the higher rate.

AWARD: The Chairman indicated that he was unable to accept the evidence of the Grievor that he had no discussion with anyone related to his salary during the period he was filling in for the foreman. The Chairman also found that there was no dispute that on previous occasions parties that filled in for the foreman received the foreman's rate. The City argued that the work was not assigned but merely offered and was ac-

81-65 (continued)

cepted by the worker and sought to distinguish that from an assignment. The Chairman indicated, however, that the City had already established the practice of paying the sub-foreman or foreman the appropriate rate during the period in which they performed the same duties and his finding was that the City could not unilaterally change the practice which it had established over the years. The Chairman further found that it would not be open to the Grievor to accept a lower rate even if he sought to do so.

81-66: Canadian Brotherhood of Railway, Transport and General Workers Union, Local 606 - AND - The Halifax Infirmary

R. Lorne MacDougall, Q.C., Chairman, G. Beck, Matthew McPherson, dissenting
Gregory I. North for the employer
Ronald Pink for the union
August 18, 1981

ISSUES: Distribution of Work Within the Bargaining Unit (5:2000); Criteria (5:2420)

CIRCUMSTANCES: A grievance was brought by the union alleging that a porter escort should have been paid the rate of carpenter/painter for certain work performed by him in stenciling some 64 wheelchairs. The employee in question was a part time porter escort and he was normally employed for 16 hours per week. The employee had requested the service manager for more work time and subsequently was requested to stencil numbers on some 64 wheelchairs for the purposes of identifying the chairs to be allocated to various departments. The employee worked about a week lettering by spraying with an aerosol can of ink. Apparently, most of the time involved in the work was in getting the chairs from the various areas of the hospital as required and then returning them to the appropriate department. The evidence indicated that the actual stenciling took about five minutes per chair and that the picking up and delivering of chairs was a normal part of the porter escort's duties. The union alleged that the work in question rightfully belonged to the painter classification which required higher pay. The majority reviewed the various tests and concluded that there was no question but that the employee had the necessary skills to do the job of stenciling.

AWARD: The Arbitration Board, in the majority, thought that the issue was whether the stenciling in question fell within the family of tasks normally performed by the painter. It was the finding of the Board that this was the first time that a porter escort was called upon to do this particular type of work and that since it was a special assignment, while there was no question as to the bonafides of management in giving the work to the employee, it could not be said that the particular stenciling job was work within the incidental duties of a porter escort. It was, therefore, the finding of the Board that on the evidence presented the stenciling job was work falling within the higher classification and therefore the actual time spent in painting should be calculated so that the employee, although not a grievor, should receive the difference between the pay which he did receive and the painter's rate at that time for the approximately six hours which was spent in actually stenciling the wheelchairs. The minority stressed that it was not efficient to break down employment in very small portions of tasks out of the total time.

Matthew J. McPherson (dissenting)

81-67: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 927 - AND - Twin Cities Co-operative Dairy Limited

81-67 (continued)

D. Merlin Nunn, Q.C.
Doug Beuree for the union
Donald MacDougall for the company
September 30, 1981

ISSUES: Culminating Incident (7:4310); Unsuitability (7:3510)

CIRCUMSTANCES: The Grievor, a tractor trailer driver, had been dismissed after an incident involving a damaged engine on the particular truck he was operating. On the evidence, he had continued to drive the truck after noticing that the engine was losing a considerable amount of oil. The engine was severely damaged as a result. The company based its discharge on two grounds: that this is a culminating incident situation, and also, that the driver was unsuitable for the job.

In response, the union argued that the discharge was for the events involving the damaged engine, and that these events were not the fault of the Grievor.

AWARD: The grievance failed. The arbitrator held that, on the evidence, the Grievor drove the vehicle in a careless and independent manner. The careless and negligent handling of company property is an industrial offence which, in these circumstances, would in itself warrant some degree of discipline. Then, when the Grievor's previous work record is considered, there is little to show that he had attempted to correct his prior attitude and behavior, despite previous warnings and opportunities.

AUTHORITIES CITED:

- Re Standard Dairy (1961), 12 L.A.C. 37
- Brown & Beatty, Canadian Labour Arbitration, p. 371
- Palmer, Collective Agreement Arbitrations in Canada, p. 226

81-68: United Textile Workers of America, Local 159 - AND - Nova Scotia Textiles Ltd.

D. Merlin Nunn, Q. C., Chairman, Boyd MacGillivray, Q. C., Thomas MacQuarrie, Q.C.
Ron Myslowke for the union
Eric Durnford for the company
July 24, 1981

ISSUES: Insubordination; Refusal to Follow Instructions (7:3610)

CIRCUMSTANCES: The Grievor, a textile seamer, had refused to re-do a flawed sweat shirt that had been rejected by the quality control staff. It was agreed by all parties on evidence that the flaw was caused by the textile processing machinery, and not the Grievor. New shop floor policy stipulated that repairs were to be done by the seamers, regardless of fault. The Grievor adamently refused to repair the sweat shirt; the refusal continued through several union-management meetings, a two-day suspension and utlimately, in the face of a dismissal.

The dismissal was grieved. It was noted that while giving evidence, the Grievor maintained that she was never going to fix the sweat shirt.

AWARD: The grievance succeeds in part. The Arbitration Board ruled that the Grievor was clearly in the wrong in refusing the work. An employee does not enjoy the luxury

81-68 (continued)

of choosing the work she will do unless the luxury is clearly expressed in the collective agreement. Regardless, she or he must obey the work order and grieve later.

The Board, however, was concerned about the harshness of the discipline. Had it not been for the Grievor's unrepentent attitude, the dismissal would have been considerably reduced to a short suspension. In the end, the Board substituted a five month suspension for the dismissal order, provided that the Grievor repair the sweat shirt in question if the company requests her to repair it.

81-69: Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers', Local 361 - AND - Moosehead Breweries Limited

D. Merlin Nunn, Q.C.
Gerald J. McConnell for the union
Ronald G. Lister, Q.C., for the company
October 2, 1981

ISSUES: Notification of Absence (7:3110); Employee disability (7:3200)

CIRCUMSTANCES: The Grievor was denied payment for sick leave on the grounds that he had not been sick, but rather had been helping a fellow employee move to a new home in Sackville.

Although the issues being grieved was sick leave payment, dispute really centers around a disbelief of what the Grievor did on the day in question. The company claimed that two junior management personal had driven out to the new house of the employee moving to Sackville, and had seen the Grievor. The union had, in turn, brought a number of witnesses who testified that the Grievor had not been at the Sackville house on the day in question. One of the union witnesses bore a striking facial resemblance to the Grievor.

AWARD: The grievance was upheld. The Arbitrator ruled that, on the evidence, the Grievor was not at the Sackville house on the day in question. The company had made an error of mistaken identity. As this issue was the only matter really argued, the Arbitrator held that the union had displaced the burden upon it that the Grievor was indeed sick.

81-70: Halifax Civic Workers' Union, Local 108 - AND - City of Halifax

R. Lorne MacDougall, Q.C., Chairman
Charles MacDougall for the union
Gerald Goneau for the city
September 23, 1981

ISSUES: Discipline; Leaving Work Without Permission (7:3130)

CIRCUMSTANCES: The Grievor, a salt truck driver, was suspended for four days after having left the salt truck he was operating running unattended.

The evidence of the city, by a staff foreman, was that he had come across the truck blocking a city street, with the engine on, and no driver. He had the truck moved to a location where it would not obstruct local traffic, and then waited for the driver.

81-70 (continued)

The foreman testified that he waited for 20 to 25 minutes before leaving, without the driver re-appearing. There is a work policy that drivers are to report by two-way radio to City Field if they are going to leave a vehicle unattended for a period of longer than a few minutes.

In defence, the Grievor claimed that he needed to use a washroom to urinate, and the closest convenient location was at a friend's apartment. He was unaware of any work policy that forbad the leaving of a vehicle for this purpose. Further, the Grievor argued that he tried to reach City Field by radio to call in, but was unsuccessful in receiving an answer.

AWARD: The grievance fails. The Arbitrator held that the work rules were violated by the Grievor. Even if such work rules were unknown to the Grievor, the fact that the truck was left running and unattended displayed a lack of reasonable behaviour. on the part of the Grievor, a trait to be expected of an employee charged with the responsibility of a valuable truck.

81-71: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 927 - AND - Producers Milk Products Limited

Brian A. Langille
Ronald Pink for the union
Deborah A. Carver for the employer
October 13, 1981

ISSUES: Estoppel (2:2200); Oral Agreements (4:1100); Past Practice (3:4430)

CIRCUMSTANCES: The Grievor had been transferred to the Truro plant of the company in 1973. In 1974, dissatisfied with his employer, he made plans to seek alternative employment. In order to keep him, the employer offered to pay him a rate above the wage in the collective agreement. The Grievor agreed to remain. From 1974 to 1980, the Grievor received an amount ranging from $6 to $9 a week over and above his wage. In 1980, the Payroll Department finally realized that the Grievor was not being paid according to his correct classification and eliminated the additional payment (the Manager who had made the original promise to the Grievor having long since gone).

The Grievor evoked the doctrine of 'estoppel', and claimed for the continuation of the additional payment, and the receipt of the payment back to its 1980 cut-off date.

AWARD: The grievance fails. The decision revolved on whether the doctrine of estoppel could be properly applied here.

The Arbitrator pointed out that the doctrine does not uphold every promise which is relied upon. Rather, it only protects reliance upon a promise not to enforce an existing legal right. Further, it can only be used as a shield against an insistence upon a strict legal right, where that right has been waived and that waiver relied upon. The reliance must be detrimental to the party invoking the doctrine.

81-71 (continued)

Applying this, the union had argued that they and the grievor had relied upon the promise of the company to pay the additional rate; detrimental reliance had occured by the fact that they had not sought a special provision in the collective agreements for the Grievor's special rate.

In his decision, the Arbitrator did not make any final ruling on whether a union could successfully argue that it suffered a detrimental reliance in not pursuing to embody the promise in a collective agreement, although he acknowledged that there was arbitration authority supporting that point. Rather, the decision held that, on the evidence, the representation regarding the additional weekly rate was made to the individual Grievor and not to the union; hence, there was no awareness by the union of the employer's action. The Arbitrator ruled that where the act of reliance is said to be failure to negotiate a new agreement, there must be awareness and reliance on the part of the union.

AUTHORITIES CITED:

- Re Auto Family Credit Union (Niagara) Ltd. (1980), 27 L.A.C. (2d) 370
- Re City of Penticton (1978), 18 L.A.C. (2d) 307
- Central London Property Trust Ltd. v. High Trees House Ltd., (1974) I.K.B. 180
- Combe v. Combe, (1951) 2 K.B. 215
- Gilbert Steel Ltd. v. University Construction Ltd. (1974), 67 D.L.R. (3d) 606
- Re E.S.B. Canada Ltd., (1975), 9 L.A.C. (2d) 26
- Re Borden Chemical Co. (Canada) Ltd., (1973), 3 L.A.C. (2d) 383
- Re Canadian Industries Ltd. (1974), 7 L.A.C. (2d) 110
- Re City of Toronto, (1967), 18 L.A.C. 279
- Le Syndicat Catholique des Employes de Magasine du Quebec Inc. v. La Compagnie Paquet Ltd. (1959), 18 D.L.R. (2d) 346
- Re T. D. Chaisson Electrical (1978) Ltd., N. S. unreported, 28, April, 1980
- Chesire and Fifoot, Law of Contracts (1976)
- Gersky, Evidence and Procedure in Canadian Labour Arbitrations (1981)

81-72: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 927 - AND - Twin Cities Co-operative Dairy Limited

Judge J.A. MacLellan
Ronald Pink for the union
Deborah Carver for the company
October 29, 1981

ISSUES: Overtime (8:2100); Past Practice (3:4430)

CIRCUMSTANCES: The Grievor claimed that he was not called in to work overtime when he was available for work and in his place, another less senior employee was called in to work the overtime. As a result, he claims that he should be paid for the three hours of overtime in dispute.

The collective agreement indicates, although not in crystal clear language that when overtime is to be assigned, seniority is the governing principle. The union argued that past practice confirms this interpretation. The company, in reply, maintained that the overtime in question came up very suddenly, and because it was not scheduled, the seniority principle did not apply.

81-72 (continued)

AWARD: The grievance was upheld. The Arbitrator held that the articles on overtime might support either interpretation, but past practice clearly indicated that the purpose of the article in question was clearly to give the overtime to the most senior man available and qualified to do the work.

81-73: International Brotherhood of Electircal Workers, Local 1030 - AND - Maritime Telegraph and Telephone Company Limited

Judge J.A. MacLellan
October 13, 1981

ISSUES: Holidays (8:3100); Past Practice (3:4430)

CIRCUMSTANCES: The Grievor, an Acadian, worked with the company as a craftsman in the town of Yarmouth. He resided in the District of Clare. He wanted to have off the 15th of August as a holiday; the day in question is the Acadian Fete Nationale and is celebrated as Natal Day in Clare.

The collective agreement stipulates that holidays are to be given to employees for community Natal Day. The company maintained that 'community' is to be read as the employee's work location and not the location of his residence.

AWARD: The grievance failed. The Arbitrator held that, based both on a reading of the collective agreement, and a review of past practice, the Natal Day holiday is where the company's operations are located.

81-74: Canadian Union of Public Employees, Local 759 - AND - The City of Sydney

T.J.K. Gillis, Q.C., Chairman, Linda Gallant, Daniel MacLeod
James Crosby for the union
M.G. Whalley, Q.C., for the city
August, 1981

ISSUES: Overtime (8:2100)

CIRCUMSTANCES: The collective agreement stated that a double shift would be paid for all work performed on Sunday. The Grievor, a salt truck driver for the city, worked a regular week of Friday to Tuesday. On the weekend in question, he reported off sick on Saturday. However, because of a snow storm, he was asked to report on Sunday, on a shift not his own. The Grievor worked six hours on the Sunday in question.

The Grievor argued that any work performed on Sunday, outside of a regularly scheduled shift, should receive double time. In reply, the city maintained that Sunday was a regular work day for the Grievor and, therefore, he is entitled only to straight time.

AWARD: The grievance failed. There is nothing in the collective agreement to indicate that work performed on a regular work day should receive overtime pay, if the regular number of hours worked has not been exceeded. If the incident had occurred on any day other than Sunday, no problem would exist since entitlement could be only for straight time pay.

81-75: Labourers International Union, Local 1115 - AND - Joneljim Concrete Construction Limited

Frank L. Elman, Q.C.
T.J.K. Gillis, Q.C., for the union
D. Merlin Nunn, Q.C., for the company
July 30, 1981

ISSUES: Past Practice (3:4430); Distribution of Work Within the Bargaining Union (5:2000)

CIRCUMSTANCES: The union grieved that the company was transferring union members from a commercial project to a industrial site without first going through the union hiring hall. This, the union argued, was a violation of the Cape Breton Island Industrial Collective Agreement, which both the union and the company were parties to. The company conceded that it had done so, but that the union had not objected in the past; it pointed to a clause in the collective agreement stipulating past practices relating to transfer of employees will continue.

AWARD: The grievance succeeds in part. The failure to grieve on previous occasions does not preclude the union from grieving now on similar circumstances. Since the union was often not aware of the unauthorized transfers until after the time to file a grievance, such breaches cannot, without the union's knowledge and acquiescence, become part of 'past practices'.

However, because the union had advised the transferred employees in question to accept the transfer and remain on the new job site, the Arbitrator held that the union was not entitled to compensation.

AUTHORITIES CITED:

- Re Celtic Construction Limited (1980, N.S., unreported)

81-76: Nova Scotia Liquor Commission Employees, Local 470 - AND - Nova Scotia Liquor Commission

R. Lorne MacDougall, Q.C.
Gregory I. North for the union
James C. Leefe, Q.C., for the commission
August 28, 1981

ISSUES: Seniority (6:0000); Job Posting (6:2310); Interpretation of Collective Agreement (4:2100)

CIRCUMSTANCES: The grievor had been hired as a casual employee without benefits in May, 1977, and was elevated to become a casual employee with benefits in May, 1978. In January, 1981, he applied for a posted position within the commission, but lost out to another employee who had been hired as a casual employee without benefits before the Grievor, but had been elevated to a casual employee with benefits after the Grievor.

The union argued that, based on the seniority clause in the collective agreement, the position should have gone to the Grievor. The proper seniority date for all purposes, they said, was the date that an employee receives that status of casual with

81-76 (continued)

benefits. In reply, the Commission argued that the proper date was when the employee was first hired by the employer.

AWARD: The grievance succeeds. The section of the collective agreement referring to casual employees stipulates that seniority of casuals with benefits will govern in a re-call situation. While the agreement is silent in stipulating the method to be used to determine the promotion of casuals with benefits, it does not in clear language suggest another method. Indeed, the parties have, in practice, consistently determined that seniority shall begin when the benefits of employees start to accrue for an employee. Likewise, here.

AUTHORITIES CITED:

- Re Tung-Sol of Canada Limited (1964), 15 L.A.C. 161
- Brown and Beatty - Canadian Labour Arbitration, p. 159

81-77: Canadian Paperworkers Union, Local 141 - AND - Bowater Mersey Paper Company Limited

Judge J.A. MacLellan
Ronald Pink for the union
J. T. MacQuarrie, Q.C., for the company
August 21, 1981

ISSUES: Past Practice (3:4430); Work Hours and Shifts (5:3100); Overtime (5:3200)

CIRCUMSTANCES: The collective agreement stated that employees required to work overtime were entitled to a meal and 20 minutes during which to eat it. The practice over the ten years which this particular clause had been in the collective agreement had been for the employees working overtime not to take their meal break until the overtime work had been completed. This grievance arose because several of the employees wanted their meal break before the overtime work was completed.

The company stressed that, in their argument, that the collective agreement must be interpreted in light of the past practice between the two parties in determining overtime meal breaks. The union, while acknowledging that the employer's interpretation had not previously been challenged, argued that clause in question, on its clear wording, unambiguously allowed employees a meal break during overtime work.

AWARD: The grievance failed. The Arbitrator was impressed by the fact that the same wording had been in the collective agreement for ten years with no grievance challenges to the company's interpretation; hence, he held that the natural inference was that the clause had been administered fairly and reasonably by the company. The Arbitrator then examined the clause in question and the collective agreement as a whole, and could find nothing restricting or inconsistent with the company's interpretation.

AUTHORITIES CITED:

- Re Canadian General Electric Company Limited (1954), 4 LAC 1546

81-78: Canadian Union of Public Employees - AND - Town of New Waterford

William Kelly
Hilroy Nathanson, Q.C., for the union
Guy LaFosse for the town
August 27, 1981

ISSUES: Entitlement to Return to Work after Recovery from Illness (8:3340)

CIRCUMSTANCES: The Grievor, a clerk with the employer, had been off work for 11 months, due to a severe accident. Towards the end of his convalescence, he was examined by a neurosurgeon for the purposes of completing a medical form to enable his disability insurance payments to continue. The neurosurgeon completed a medical form for the Grievor. Shortly afterwards, the Grievor approached the town Mayor in regards to returning to his job. He was asked by the Mayor and town council for a medical certificate of fitness; he showed them the medical report that had been compiled for continuing his disability benefits. The medical report was rejected by the town, because of its purpose and its indication that the Grievor was not yet able to work full time. A further medical document was not obtained for another seven weeks.

The Grievor asked in his grievance to be paid for the period from the presentation of the initial medical form to his eventual return to work two and one-half months later.

AWARD: The grievance succeeds in part. The Arbitrator held that the town's action in requesting the Grievor to supply further medical documents regarding his ability to return to work was reasonable and proper. Nor can the town be responsible for the Grievor's delay in obtaining the medical certificate asked for.

However, the town did not give the initial medical document a reasonable review from the time they were first made aware of it, until the town council's discussion of it a week later. Since the Grievor was available and presented himself for work each day that week, he is entitled to be paid for that week.

81-79: General Workers of Sydney, C.L.C., Local 1509 - AND - Heckett - Division of Harsco Corporation

Judge J.A. MacLellan
Raymond Larkin for the union
John Merrick for the company
August 11, 1981

ISSUES: Theft (7:3310); Past Employment Record (7:4428)

CIRCUMSTANCES: The Grievor had been discharged by the company after a full can of fire clay was found by a company supervisor in the employee's lunch room. The Grievor admitted placing the fire clay in the lunch room. (The fire clay is used to repair furnaces. The company forbids employees from taking the clay off the company's premises or making personal use of it.) This Grievor, however, stated that during his entire two and one-half year employment with the company, there had always been a can of fire clay in the company buidings, and that the particular can in question had been in full view in the lunch room for a week prior to the incident. Further, it was common practice by the employees to take small quantities for personal use.

81-79 (continued)

AWARD: The grievance suceeds in part. The Arbitrator, while stressing that the removal of the fire clay from the company's premises for personal use was wrong, ruled that it was accepted practice by the employees. Hence, he reduced the Grievor's dismissal to a four and one-half month suspension.

AUTHORITIES CITED:

- Re Sasso Disposal Limited (1975), 9 L.A.C. (2d) 152
- Re Canadian Lukens Limited (1976), 12 L.A.C. (2d) 439
- Re Toronto East General Hospital (1975), 9 L.A.C. (2d) 311

81-80: Nova Scotia Government Employees Union - AND - Nova Scotia Civil Service Commission

E. Lorne MacDougall, Q.C.
August 31, 1981

ISSUES: Seniority (6:2000); Arbitrability (2:3000)

CIRCUMSTANCES: The Grievor, a court reporter with the Amherst Family Court, applied for the posted position of Enforcement Officer, with the same court, pursuant to vacancy notices posted province-wide. The position, which fell within another bargaining unit governed between the two parties, was awarded to another applicant with less seniority. In her grievance, the Grievor asserted her seniority rights under the collective agreement.

The Civil Service Commission objected to the grievance, arguing that the plain language of the seniority clause of the collective agreement is limited only to positions within the Grievor's bargaining unit. To have this issue adjudicated would be an invasion of the seniority rights of the members of the other bargaining unit.

AWARD: The grievance fails. The Arbitrator ruled that the vacancy being grieved about was not within the Grievor's bargaining unit and therefore no obligation under the collective agreement in question with respect to the seniority rights of the Grievor.

AUTHORITIES CITED:

- Re Metropolitan Toronto (1979), 21 L.A.C. (2d) 424
- N.S.G.E.A. et al v. Nova Scotia Civil Service Commission (1977), 24 N.S.R. (2d) 364
- Brown and Beatty, Canadian Labour Arbitration, p. 231

81-81: Dartmouth General Hospital and Community Health Centre - AND - Canadian Brotherhood of Railway, Transport and General Workers Union, Local 606

Brian Langille, Chairman, Ray Hill, M.J. McPherson
Ronald A. Pink for the union
Gregory I. North and Terry Roane for the employer
November 6, 1981

81-81 (continued)

ISSUES: Bias and Interest (1:5210)

CIRCUMSTANCES: The union raised a preliminary objection that the employer's nominee to the Arbitration Board should be disqualified for bias. The union argued that the employer nominee had performed work on a consulting basis for the Association of Health Organizations, thus rendering him an interested party to the arbitration proceedings.

AWARD: The preliminary objection of the union fails.

Firstly, an apparently agreed upon procedure that would expediate the hearing through a submission of an agreed statement of facts and written arguments did not occur. Consequently, there was no evidence before the Board upon which a determination of the preliminary objection could be made. To make an award based on evidence which neither side had presented would clearly be exceeding the Board's jurisdiction.

Secondly, even if the allegations of facts were accepted by the Board, there would not have been a trangression of accepted legal principles on the question of bias. The fact that the employer nominee may have performed consulting work of an organization which has a working relationship with the employer would not bring him within the prohibited relationship. To apply the question of bias and interest in a broad manner to labour arbitration tribunals would be to deprive the arbitration process of experienced, knowledgeable and skilled people from the industrial relations field.

AUTHORITIES CITED:

- Re City of Sydney (1978), 19 L.A.C. (2d) 330
- Re Phillips Cable Ltd. (1976), 10 L.A.C. (2d) 376
- Re Canadian Shipbuilding and Engineering Ltd. (1973), 36 D.L.R. (3d) 374
- Gorsky, Evidence and Procedure in Canadian Labour Arbitration (1981) p. 94-98

81-82: Board of Governors of Dalhousie College and University - AND - Dalhousie Faculty Association

Judge J. A. MacLellan, Chairman, J.T. MacQuarrie, Q.C., Alan Kennedy, dissenting
June 11, 1981

ISSUES: Bias and Interest (1:5210)

CIRCUMSTANCES: A preliminary objection was made by the University at the commencement of the hearing. It argued that Dr. Kennedy, the union nominee on the Arbitration Board, should be disqualified because of bias and interest.

The University's position was that the nominee was, at all relevant times, a member of the union's executive; that he took part in the decision of the union to initiate the present grievance, and, finally, that he took part in the union executive decision where the decision to take the principal grievance to arbitration was made. Hence, the nominee's prior involvement in the present matter would prevent him from acting judicially.

The response of the union was that this type of tripartite arbitration procedure envisages a representative type board, hence, the common-law principles of natural justice cannot be strictly applied. Further the union pointed to the arbitration provision in the collective agreement, which allows the union to nominate one of its own members to an arbitration board.

81-82 (continued)

AWARD: The preliminary objection of the university succeeds. The arbitration board majority recognized that tripartite boards in labour arbitrations contain a built in bias, where the parties' nominees will likely to be included to favour the parties who have nominated them.

However, this principle does not extend to the point where the nominees are present, and discuss the merits prior to the arbitration hearing.

DISSENT: A dissent was entered by the union's nominee, who acknowledged the rather awkward position of considering, as a member of the Board, whether he should be a member of it.

Dr. Kennedy pointed out that the discussion of the grievance in question at the union executive level was whether the grievance - as a point of principle in the contract as opposed to the merits of the particular case - should go to arbitration. Hence, his consideration of the grievance on its merits would not be tainted by any inability to act judicially.

AUTHORITIES CITED:

- Re City of Sydney (1978), 19 L.A.C. (2d) 330
- Re Phillips Cables Ltd. (1975), 10 L.A.C. (2d) 376
- Re Corporation of City of Windsor (1973), 6 L.A.C. (2d) 98
- Swilard v. Szarz (1955) 1 D.L.R. 370 (S.C.C.)
- Re Gainers Ltd. (1964), 47 W.W.R. 544
- Re Gypoumville (1979), 10 D.L.R. (3rd) 673
- Palmer, Collective Agreement Arbitration in Canada, p. 10-11
- Brown and Beatty, Canadian Labour Arbitration, p. 25
- 1 Halsbury's Laws of England (4th ed.) p. 83

81-83: Town of New Waterford, Board of School Commissioners - AND - Nova Scotia Teachers' Union, New Waterford Local

Frank L. Elman, Q.C.
Gregory I. North for the union
Robert Street for the Board
November 4, 1981

ISSUES: Substitute Teachers; Temporary Employees (5:1124)

CIRCUMSTANCES: The collective agreement between the parties stated that, where available, substitute teachers shall be hired for all absent teachers with classroom responsibilities, regardless of the length of the term of the substitution.

A music teacher working for the School Board was ill for a period of several months. To cover her specialized teaching responsibilities, the Board searched, without success, for a qualified substitute teacher. The Board then turned to the 'in-house' teachers, at the school in question, to carry out the functions of the specialized teacher, as opposed to hiring a substitute without the special skills.

The union argued that the Board, in doing so, violated the collective agreement. It contended that a substitute teacher with a 'general license' (there no longer being

81-83 (continued)

'specialized' licenses issued by the Department of Education) are qualified to handle the job. Further, such 'general license' substitute teachers, because of their general training would be quick to pick up the program, and hence, would be as well qualified as the 'in-house' teachers who are required to fill in.

In sum, the Board argued that unless a specialized substitute teacher was available, then they neen not hire a substitute for the absent specialized. On the other hand, the union contended that substitute teachers are to be hired in every case where a teacher having classroom responsibilities is absent.

AWARD: The grievance succeeds. On the wording of the article in question, the Arbitrator could not add the word, 'specialist' to describe the substitute teachers who are to be hired. Accordingly, reading the clause's language in its normal and ordinary sense, the Board is obligated to provide a substitute teacher where a teaching absence occurs, regardless of the fact that the substitute teacher may not possess the special skills of the absent teacher.

AUTHORITIES CITED:

- Brown & Beatty, Canadian Labour Arbitration, p. 162

81-84: Nova Scotia Power Corporation - AND - International Brotherhood of Electrical Workers, Local 1928

Judge Robert F. Ferguson
Gerry McConnell for the union
D. Merlin Nunn, Q.C., for the company
September, 1981

ISSUES: Refusal to follow instructions (7:3610); Health and Safety (7:3621)

CIRCUMSTANCES: The grievor, a mechanic, had been requested by his foreman to repair a Timber-Jack truck. In order to repair it, however, the grievor first had to drive it into the garage, according to the grievor's testimony. He refused because his unfamiliarity with the vehicle made him fear for his safety. As a result of his refusal, he was suspended for one and one-half days.

AWARD: The grievance fails. The arbitrator applied the 'reasonable belief' test in determining whether the refusal could be upheld on safety considerations, i.e. (1) the nature of the danger apprehended; (2) the grievor's belief in the seriousness of the danger; (3) the communication of the reason for refusal. On the facts, the arbitrator held that the belief could not be reasonable, since the evidence establishes that the vehicle moves very slowly, and is very easily stopped.

AUTHORITIES CITED:

- Re Steel Co. of Canada (1975) , 8 L.A.C. (2d) 375

81-85: Associated Freezers of Canada Limited - AND - Retail, Wholesale and Department Store Union, Local 1015

Judge J.A. MacLellan
September 4, 1981

81-85 (continied)

ISSUES: Lateness (7:3140)

CIRCUMSTANCES: The grievor, a truck driver for a frozen food shipping company, was suspended for two days after an incident where he showed up late for a scheduled run to Moncton. There had been an incident involving lateness a month before, where he had received a written warning.

The company stressed in its testimony the importance of punctuality in its operartion, and that procedures had been established for a driver to call ahead if he was going to be late. In reply, the grievor acknowledged the company's stress on punctuality, and pointed to sudden, unforeseen circumstances arising (i.e. the breakdown of his car) that caused his second incident of lateness.

AWARD: The grievance succeeds in part. The arbitrator acknowledged the company's need to service its customers on time, and the grievor's failure to telephone the company when his lateness was apparent. He balanced this with the grievor's prior good work record and the mitigating circumstances. As a consequence, the suspension was reduced to one day.

AUTHORITIES CITED:

- Re Toronto East General Hospital Inc. (1975), 9 L.A.C. (2d) 311

81-86: Maritime Beverages Limited - AND - Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927

Judge J.A. MacLellan, Chairman, Donald MacDougall, Wallace Jewers
Doug Beuree for the union
Eric Durnford for the company
August 17, 1981

ISSUES: Insubordination ; Refusal to follow Instructions (7:3610)

CIRCUMSTANCES: The two grievors, both warehousemen, had been asked by their foreman to move the company trucks from outside the warehouse inside in order to unload them. Normally, any one on the shift who has a chauffeurs license and who is close by the trucks would move them. When asked, both grievors in turn refused. The first grievor, who was a shop steward, was suspended for three days; the second grievor, for two.

The first grievor testified that he had lost his chauffeurs license for a driving infraction, and thus to comply with the order would be to commit an illegal act. However, he admitted that he had not explained this to the foreman at the time of the refusal.

The second grievor did not testify and no reason was offered for his refusal.

AWARD: The grievance succeeds in part. The Arbitration Board sustained the second grievor's two day suspension, as his refusal was unjustified, and the imposition of discipline by the company was proper.

However, the Board reduced the first grievor's suspension from three days to one day. The Board ruled that there was no malice on the part of the grievor, and, as well, there was confusion over the right of the grievor to legally operate the truck.

81-86 (continued)

On the other hand, he was a shop steward, and had a responsibility to act as an example to the men he worked with.

81-87: Maritime Beverages Limited - AND - Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927

Lorne MacDougall, Q.C., Chairman, Donald MacDougall, Wallace Jewers
Ronald Pink for the union
Eric Durnford for the company
October 1, 1981

ISSUES: Cost of Living Allowance (8:2400); Mistake as to Terms

CIRCUMSTANCES: In its grievance, the union alleged that the employer erred in its calculation of the cost of living allowance (COLA) clause. Specifically, the union argued that the month of January in the three year contract between the parties is not only the base month in each year for the purposes of calculating COLA benefits, but is also the concluding month for each yearly period. The employer, on the other hand, contended that a plain reading of the clause in question shows that the month of January is the base month only. The differing interpretations arose because the collective agreement provides for yearly periods extending from February 1 to January 31 of each year, but also provides that January will be the base month for calculating the COLA formula.

AWARD: The union grievance fails. The Arbitration Board noted that the collective agreeement had included a section entitled: "How the Formula will Operate". The Board ruled that this section clearly used January as a base month only. In considering the union's contention that, if this was so, then the agreement was mistaken, the Board relied on Toronto Police Association v. Board of Commissioners of Police (1974) 45 D.L.R. (3rd) 548 in holding that it has no power to deal with a purported mistake in the agreement, and indeed is bound by the terms as expressed in the agreement alone.

AUTHORITIES CITED:

- Toronto Police Association v. Board of Commissioners of Police (1974) 45 D.L.R. (3rd) 548

81-88: Saint Rita Hospital - AND - The Nova Scotia Nurses' Union

Simon MacDonald, Chairman, James Crosby, Matthew MacPherson
David Reynolds for the union
Donald MacDougall for the hospital
September, 1981

ISSUES: Vacancies (5:2510)

CIRCUMSTANCES: The grievor, a nurse, had been hired by the hospital on a temporary part-time basis to work every second weekend. After 11 months of working on this arrangement on a regular basis, the union filed a grievance, claiming that the hospital breached the collective agreement by not classifying the grievor as a regular

81-88 (continued)

part-time nurse.

AWARD: The union grievance fails. The Arbitration Board upheld the hospital's classification of the grievor, based on the principles that the organization of the work force is, in the absence of specific restrictive provisions, in the hands of management. In the collective agreement in question, there are no restrictions on management in determining employee classifications; further, the grievor was determined not to be occupying a 'regular' position, since the hospital had not, in good faith, classified her as occupying that position.

AUTHORITIES CITED:

- Brown & Beatty, Canadian Labour Arbitration, p. 202-3
- Re Canada Bread Co. (1965) 16 L.A.C. 202
- Re Lablas Grocerteria (1963) 14 L.A.C. 53
- Palmer on Arbitration, p. 380

81-89: Board of School Commissioners of the Northside-Victoria Amalgamated Board - AND - The Nova Scotia Teachers' Union

Charles O'Connell
R.J. Downie for the union
Robert Street for the school board
July 20, 1981

ISSUES: Sabbatical Leave; benefits (8:1400, 8:3330)

CIRCUMSTANCES: The grievor was one of six applicants in the School Board district applying for a sabbatical leave year. The collective agreement specifies that a minimum of five teachers shall be granted sabbatical leave each year and, in fact, the policy of the Committee supervision sabbatical leave has been to grant only five applications a year.

The grievor was the only applicant not selected. However, the Committee decided that if one of the applicants offered a leave declined, then the grievor would replace her. When the grievor was informed by letter that she was unsuccessful, she was not also informed of the replacement possibility.

Subsequently, one of the successful applicants declined the offer of a leave. About this time, the grievor found out about her replacement possibility status. However, the School Board Superintendent, when asked to now offer a leave to the grievor, ruled that the Committee had no authority to replace the original applicant. A grievance was then filed, claiming that the failure of the Committee to fully inform the grievor of the decision regarding her application was a breach of the collective agreement.

AWARD: The union grievance was upheld. The failure to fully inform the grievor was a breach of the collective agreement.

81-90: Seaport Contractors Limited - AND - Labourers' International Union, Local 615

81-90 (continued)

S. Bruce Outhouse, Esq.
Ronald Pink for the union
Merlin Nunn, Q.C., for the employer
July 13, 1981

ISSUES: Interpretation (4:2000)

CIRCUMSTANCES: The issue arising from the grievance is whether outdoor sewer construciton work being performed at an industrial project falls under one of two sectors governing wage rates for construction work.

The union argued that since the sewers were being built at a larger industrial plant site, the work fell within the industrial and commercial sector of the construction industry (as set out in s. 89 (h), Trade Union Act), and therefore, the relationship between the union and the employer was governed by the Multi-Group Construction Industry Agreement, and its wage rates should apply.

On the other hand, the company argued that the work fell within the sewers, tunnels and water main sector of the construction industry, and therefore, the wage rate of the particular collective agreement between the two parties should apply.

AWARD: The union grievance failed. The Arbitrator held that since the work being performed was clearly the construction of sewers, therefore, on the plain meaning of s. 89 (h) of the Trade Union Act, the work fell within the sewers, tunnels, and water sectors of the construction industry. Hence, the wage rates of the parties' collective agreement applied.

81-91: Town of New Waterford - AND - The Canadian Union of Public Employees

F.B. William Kelly
Hilroy Nathanson, Q.C., for the union
Guy LaFosse for the town
August 31, 1981

ISSUES: Demotion (7:4250); Suspension (7:3610); Seniority and Demotion (6:2000); Discrimination (7:4414)

CIRCUMSTANCES: The grievor was a municipal official who, after 18 years of employment, had been demoted by the town from Assistant Tax Collector to Cashier. The grievor filed a grievance against the demotion, and a second grievance both against what he felt were discriminatory acts by town officials against him, and against an indefinite suspension imposed upon him after an initial refusal to accept the demotion. The bulk of the decision was a lengthy recitation of the facts surrounding the incidents in question.

AWARD: The grievance concerning the demotion without just cause was upheld, in that the town failed to show through evidence that the grievor's ability or competence warranted a demotion. The town was only able to transfer the grievor to other employment which would not affect his seniority and other rights as set out in the collective agreement.

81-91 (continued)

The grievance concerning the alleged discriminatory actions and the suspension from work was dismissed, on the grounds that the town and its officials were acting in good faith, and within the management rights clause of the agreement.

81-92: Maritime Beverages Limited - AND - Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927

Judge J.A. MacLellan, Chairman, Rene Quigley, J.T. MacQuarrie, Q.C., dissenting
Ron Pink for the union
Eric Durnford for the company
October 6, 1981

ISSUES: Liability of Union (9:3424)

CIRCUMSTANCES: A preliminary objection as to timeliness was raised by the union. It argued that the company's appointment of their nominee to the Arbitration Board was made after the ten day mandatory time limit stipulated in the collective agreement. The Board dismissed the preliminary objection, ruling that the union had not proved the date of the presentation of the grievance, and therefore, cannot now rely on the time limits to argue that they have been violated.

The issue of the main grievance dealt with the liability of unions when the company has suffered damages as a result of a work stoppage, in violation of a 'no-strike' clause in the collective agreement. When the spontaneous job action occurred, the union's staff officials were contacted by the shop stewards, and arrived shortly afterwards to deal with the situation. After conversations with plant officials and the striking employees, the union official eventually persuaded their members to return to work. Meanwhile, the bottling plant, as a result of the work stoppage, had to dump nearly $400 worth of syrup. The company subsequently filed a grievance against the union, claiming damages for the lost syrup.

AWARD: The company grievance was denied, by a majority of the Board. The test employed, based on the principles developed in Re Polymer Corp. Ltd. (1958), 10 L.A.C. 31, was the liability will not be found against union officials, in circumstances involving a violation of a 'no-stirke' clause, where it can be established that the officials did not lead, encourage, inspire or condone the work stoppage, but rather, fulfilled their affirmative obligation to take all reasonable and prompt steps to end the strike. Unions do not assume an absolute or strict liability for unlawful strikes, simply by virtue of a 'no-strike' clause in the collective agreement.

On the facts of the present case, such an obligation was discharged by the union officials and, therefore, the union was not held responsible for the company losses arising from the illegal work stoppage.

J.T. MacQuarrie, Q.C., dissented. He held that the illegal strike was a violation of the clear and unambiguous wording of the agreement's no-strike clause and that, on the facts, the union officials did not discharge their affirmative duty.

AUTHORITIES CITED:

- Re Polymer Corp. Ltd. (1958), 10 L.A.C. 31

81-92 (continued)

- Re Ontario Steel Corp. (1968), 19 L.A.C. 260
- Brown & Beatty on Canadian Labour Arbitration, p. 514
- Re Atomic Energy of Canada Ltd., unreported 1978 Nova Scotia decision

81-93: Dalhousie Faculty Association - AND - The Board of Governors of Dalhousie College and University

S. Bruce Outhouse, Esq.
Gerald McConnell for the union
Wylie Spicer for the university
July 13, 1981

ISSUES: Interpretation of Collective Agreement (4:2000); Scale for Establishing Wage Increases (8:2320)

CIRCUMSTANCES: The collective agreement between the parties called or a wage increase for university instructors based on the scale (called an Income Maintenance Change, or I.M.C.) to be agreed upon for professional librarians and faculty, who were different bodies in the same bargaining unit. At the time this agreement between the university and the instructors was concluded, negotiations were still proceeding for the librarians and faculty. Unforeseen by the parties, not one but two I.M.C.'s were negotiated in the librarians' and faculty's agreement.

The university took the position that the instructors were entitled to the lower I.M.C. The union argued that it was entitled to the higher wage increase scale.

AWARD: The union grievance fails. The Arbitrator ruled that the two I.M.C.'s in the librarian-faculty's agreement created an unresolvable ambiguity; in addition, he could find no intention on the part of the parties to prefer one of the I.M.C.'s over the other. Hence, to choose between the two I.M.C.'s would be to cover contingencies in the agreement that the parties never considered, which is outside the function of an arbitrator. The proper course for an arbitrator to take in such circumstances is to decline to enforce the contract or, if the contract is severable, that portion of the contract which is uncertain.

81-94: Halifax Industries Limited - AND - Industrial Union of Marine and Shipbuilding Workers, Local 13

W.C. Kennettle
J.K. Bell for the union
Deborah Carver for the company
September 23, 1981

ISSUES: Insubordination; Refusal to Follow Instructions (7:3610)

CIRCUMSTANCES: The grievor, a welder, was requested by the welding foreman to weld a number of anodes onto a ship. The evidence of the actual exchange between the grievor and his foreman was in dispute. The grievor stated that he refused to weld unless he was supplied with a leather jacket. The foreman, on the other hand, testified that the grievor simply wanted a 'pass out', and there was no discussion at all about protective clothing. As a consequence, the grievor was suspended for five days.

AWARD: The grievance succeeds in part. The Arbitrator felt that the onus was on the grievor to specifically request protective clothing from his foreman, and, on the evidence, this was not done. On the other hand, the Arbitrator was at a loss to understand why the foreman did not inquire of the grievor his reason for requesting a 'pass out', especially in light of the existing circumstances.

While the industrial plant is not a debating society, it must be recognized that production can only be achieved by a reasonable exercise of authority and by a reasonable response to such authority.

In light of the circumstances, the Arbitrator reduced the suspension to two and one-half days.

81-95: Halifax Industries Limited - AND - Industrial Union of Marine and Shipbuilding Workers, Local 1

Judge J.A. MacLellan
Gerald McConnell for the union
Deborah Carver for the company
October 2, 1981

ISSUES: Seniority; Application for Promotion (6:2100)

CIRCUMSTANCES: The collective agreement governing the parties stated that the position of chargehand would be chosen after considering the qualifications and physical fitness of the pool of eligible workers. If these factors are relatively equal, seniority shall be the determining factor.

The grievor had been third on a seniority list of five men eligible for the chargehand position. The first two men on the list were offered the position, but declined. The fifth man on the list was then offered the position. He accepted. The grievor contended that the company violated the collective agreement by overlooking his position on the seniority list.

AWARD: The grievance succeeds. The Arbitrator found that the company had used the seniority standard in approaching the first two men on the list and offering the chargehand position to them, but then used a different standard when approaching the fifth person on the list. The company did not apply the standards consistently, and, as a result, the selection process was unfair to the grievor.

The grievor was reimbursed for the extra monies he would have earned had he been appointed temporary chargehand.

81-96: B.C. Checo International Limited and Dawcolectric Limited - AND - International Brotherhood of Electrical Workers, Local 625

Brian Langille
Fern Tardiff for the union
D. Merlin Nunn, Q.C., for the bureau
October 13, 1981

ISSUES: Monetary Penalties (7:4220); Withholding Wages (8:1420)

CIRCUMSTANCES: Some members of the grieving union walked off work on a Friday, affecting construction at the work sites of both employers. The work stoppage was illegal. On the following Monday, all of the employees of the two employers reported for work as usual. A supervisor for one of the employers (Checo) refused to allow

81-96 (continued)

the 21 participants of Friday's work stoppage to work until further discussions had been held with union representatives. Subsequently, the remaining 28 employees at Checo walked off the job, and all 49 employees remained on a wildcat strike until Wednesday morning. Similarly, at Dawcolectric, all employees walked of work after lunch on Monday, and did not return to work until Wednesday.

The collective agreement stipulated that a commuting allowance was to be paid "per day worked". At issue in the situation was the entitlement of the employees who participated in the illegal work stoppage on Monday to their room and board or travel allowance for that day.

AWARD: The union grievance succeeded in part.

As reference, the Arbitrator referred to the principles he had enunciated in an earlier unreported 1981 decision: Re Construction Association Management Labour Bureau Limited. In that decision, he held that the purpose of commuting pay is to compensate employees for expenses incurred in travelling to, or boarding at, the worksite, but only if the employee works on the day in question. Further, the Arbitrator stressed that the earlier decision did not state that the withholding of commuting pay may not be invoked as a form of discipline.

The Arbitrator extended that reasoning in the present case by holding that if an act merits discipline, then there is nothing wrong with withholding commuting pay as a form of discipline, subject to the 'just cause' standard. However, the employer cannot withhold the entire commuting allowance if in fact the employees have worked part of the day; the proper route would be to withhold the allowance on a pro-rata basis.

Accordingly, the Checo and Dawcolectric employees who worked part of the Monday work day before engaging in the illegal strike were to be compensated for their room and board or their commuting expenses on a pro-rata basis.

The employees who engaged in the illegal strike on Friday and continued their work stoppage through the following Monday argued that they were entitled to the room and board or commuting allowance because the employer forbade them from working on Monday until he met with union representatives, thus illegally locking them out. The Arbitrator refused to accept this argument and thus denied their claim, holding that employees who have engaged in an illegal work stoppage to not thereby have the right to stop that work stoppage and demand that the employer put them back to work whenever they decide to come back.

AUTHORITIES CITED:

- Re Construction Association Management Labour Bureau Limited (1981) unreported Nova Scotia
- Re Regent Refining (Canada) (1976), 13 L.A.C. (2d) 88
- Re Fittings Limited (1957), 7 L.A.C. 274
- Palmer, Collective Agreement Arbitration in Canada, p. 513
- Brown & Beatty, Canadian Labour Arbitration, p. 366-367

81-97: Board of Trustees of the Annapolis Regional Schools - AND - The Nova Scotia Teachers' Union

81-97 (continued)

R. Lorne MacDougall, Q.C.
Ronald J. Downie, Q.C., for the union
Donald H. McDougall for the board
June 18, 1981

ISSUES: Sabbatical Leave; Estoppel (2:2220)

CIRCUMSTANCES: The grievor applied for a sabbatical leave and was turned down by the Board of Trustees. The collective agreement provides that a sabbatical leave "may" be granted by the Board; after listing the reasons for which a sabbatical leave shall be used for, the same article states that it "shall" be granted to an applicant if all conditions have been satisfied.

The Board argued that in the three previous negotiating sessions, the union had insisted, and subsequently dropped, their demand that the sabbatical leave clause be changed from "may" to "shall". The resulting implication, argued the Board, was that it had complete discretionary power to award or deny leave; and further, that there was an understanding between it and the union that no sabbatical leaves would be granted until the province agreed to a cost-sharing scheme. As evidence of this implication, no applications for sabbatical leave had been made until the one presently at issue.

The union argued that the language of the particular clause indicates that once the reasons for which a sabbatical leave have been met, a teacher is entitled to a sabbatical leave as of right.

In response, the Board argued that the union is estoppel form placing this interpretation on the article in question, since it had agreed from the first introduction of the article in 1973 that the granting of sabbatical leaves was a discretionary matter entirely in the hands of the Board.

AWARD: The union grievance fails. The Arbitrator held that the evidence of past negotiating history clearly indicates that both parties were of the opinion that the matter of sabbatical leaves was a discretionary matter entirely a matter for the Board.

Further, the extrinsic evidence presented to the Arbitrator clearly showed that "may" and "shall" in the article in question were meant to have a directory effect.

Finally, the Board raised a successful defence of estoppel, evidenced by both the lack of applications for sabbatical leave over the years, and the past negotiating history.

AUTHORITIES CITED:

- Re Trustees of Ottawa Civic Hospital (1975), 10 L.A.C. (2d)
- Re Canadian General Electric Company Limited (1971) 22 L.A.C. 149

81-98: Hermes Electronics Limited - AND - International Brotherhood of Electrical Workers, Local 1651

Judge J.A. MacLellan, Chairman
Rick Clarke
Donald McDougall
October 16, 1981

81-98 (continued)

ISSUES: Company Rules (4:1500)

CIRCUMSTANCES: The company introduced a new policy directive concerning absenteeism, which listed examples of excused and unexcused absences, and possible penalties. The union contended that the policy directive conflicted with several provisions of the collective agreement, and should be withdrawn. The company, on the other hand, contended that the policy directive, and particularly its penalty provisions, were not in conflict with the collective agreement, in so much as the collective agreement uses the term "may" in reference to penalties, and thus allows a measure of discretion which this directive falls within.

AWARD: The union grievance fails. The Board majority held that the policy directive was not unreasonable and not inconsistent with any term in the collective agreement. The company was permitted a measure of discretion in the agreement in determining penalties for absenteeism, and the Board agreed with the company that the policy directive fell within the four corners of this discretion.

Rick Clarke dissented. He argued that the policy directive meant that the company was unilaterally imposing a policy which had been an area of negotiations as an amendment to a section of the collective agreement. This interpretation was evidenced by the inclusive meaning of the agreement's articles on the parties' rights and duties.

81-99: Stephens Building Supplies (1979) Limited - AND - Retail, Wholesale and Department Store Union, Local 596

T.J.K. Gillis
Thomas Pickford and Bernard Campbell for the union
H.S. Nathanson, Q.C., for the company
October 12, 1981

ISSUES: Dismissal for Just Cause (7:1100)

CIRCUMSTANCES: The grievor, a pricing officer, was hired on a part-time basis by the company. Her husband, who did the hiring, was its President and General Manager, as well as one of the owners.

The grievor, in the course of her duties, dealt with discounts and quotes given to customers of the company. The company's best customer, Joneljim Limited, was also owned by two of the other owners of Stephens Building Supplies (1979). Subsequent complaints began to arise by the two Joneljim owners, who felt that the grievor was not allowing Joneljim all the discounts to which it was entitled. Other complaints expressed by the Stephens shareholders about the grievor included the fact that she did her work at home, and that the wife of a shareholder and officer of the company also held an employment position with the company. However, no complaints were made of the grievor's job performance, which was accepted by the Arbitrator as being of high quality.

On the instructions of the Board of Directors, the grievor was fired.

In the arbitration hearing, the union argued that the collective agreement provided that a regular employee could be dismissed only for just cause.

81-99 (continued)

AWARD: The grievance succeeds. The Arbitrator held that the grievor was a regular, if part-time, employee and, therefore, entitled to the protection of the "just cause" provision in the collective agreement. While the husband-wife relationship between the grievor and the company President does create a possible conflict of interest, there was no evidence of such a conflict arising and, thereby, has no bearing on the grievor's claim for reinstatement.

81-100: Dalhousie University - AND - The Dalhousie Staff Association

D. Merlin Nunn, Q.C.
Gerald J. McConnell for the Association
Eric B. Durnford for the university
December 9, 1981

ISSUES: Revision of Job Classification (5:2420)

CIRCUMSTANCES: The grievance arose over the university's reclassification of a position. An administration post in the Department of Graduate Studies had previously been classified as Clerk 4. When the individual performing the job was promoted to become the Administrative Assistant in the Department, the vacant post was advertised as a Clerk 3 position. The only difference between the prior Clerk 4 job description and the present Clerk 3 job description was that the former position was performed with some supervision by the Dean of Graduate Studies, while the later position was performed with some supervision by the Administrative Assistant. In all other respects, the two job descriptions were identical.

The Staff Association, while admitting that the employer has the right to re-classify subject to a collective agreement, argued that the test in the arbitration jurisprudence is that the university must establish that there was a real and substantial change in the job's function, which had not occurred here. Hence, the position ought to be re-classified to its original ranking with retroactivity awarded to the Staff Association member who had filled the vacant Clerk 3 position.

The university replied by arguing that an essential ingredient of the job had changed, an ingredient that was a real and substantial alteration concerning the position. Furthermore, there was nothing in the evidence of the Staff Association which indicated that the downgrading was not either bona fide or in accordance with the collective agreement.

AWARD: The grievance succeeds. There was no real change in the job duties of the position in question. The changes which the university had assumed would effect the job evaluation did not occur, and hence, the re-classification, although performed in good faith, was a breach of the collective agreement.

Retroactive pay was awarded back to the date that the grievance was filed.

AUTHORITIES CITED:

- Re Corp. of Borough of Scarborough and CUPE, Local 368
- Re Auto Aircraft Ltd. and IAM, Local 2030

81-101: The Canadian Rock Salt Company Limited - AND - The Energy and Chemical Worker's' Union, Local 823

T.J.K. Gillis, Q.C., Chairman, Douglas Eddy, George Morrison
John Kane for the union
R.B. MacDonald for the company
December, 1981

ISSUES: Calculation of Wages (8:1000)

CIRCUMSTANCES: The grievor, an Industrial Mechanic Apprentice, grieved that according to the collective agreement, he was entitled to receive 95 per cent of a journeyman's rate for the last six months of his first class apprenticeship status. He argued that he had completed the requisite requirements of service to be entitled to the pay, and requested as an award, the difference in what he received and what he would have received had the calculation of pay been computed correctly.

The company, in turn, argued that the reference in the collective agreement to journeyman maintenance has a different connotation than journeyman as defined in the Apprenticeship and Tradesmen's Qualifications Act. Hence, the grievor's pay was correctly calculated. However, the company admitted that its own definition of 'journeyman' was not in either of the two collective agreements covering the periods in question.

AWARD: The grievance succeeds. The Arbitration Board majority held that where a company or a person gives a specialized meaning to a word or phrase, it has a duty to ensure that such a specialized meaning is clearly set forth in any document using that particular word or phrase. This was not done here, and hence, the company was not entitled to rely on its meaning of 'journeyman'.

DISSENT: One of the Board members dissented from the award, arguing that according to the collective agreement, the grievor was proplerly paid for his classification.

81-102: The Nova Scotia Liquor Commission - AND - The Association of Commercial and Technical Employees, Local 1670

Judge J.A. MacLellan
Gregory I. North for the union
James C. Leefe, Q.C., for the Commission
December 8, 1981

ISSUES: Incentive Rates (8:2200)

CIRCUMSTANCES: This grievance centered upon an incentive plan as provided in the collective agreement whereby if a store managermanages a store with sales that justify a designation at a higher classification, then the store manager is entitlted to a higher rate of pay.

The grievor, the manager of the Commission store in the town of Annapolis, argued that the Liquor Commission had excluded the direct delivery of bottled beer to C.F.B. Cornwallis in calculating the "annual net sales" of the Annapolis store. Evidence was lead by the union that the Annapolis store had changed in 1972 from an "over-the-counter" store to a "self-service" store. Prior to the change, the bottled beer destined for C.F.B. Cornwallis had been handled physically by the Annapolis store. After the change, because of a reduction in space, the bottled beer was directly delivered to C.F.B. Cornwallis from Halifax, however, all paperwork regarding the order continued to be done by the Annapolis store manager.

81-102 (continued)

The Commission replied by leading accounting evidence regarding the determination of "annual net sales" and directly delivered bottled beer. Specifically, their oral and written evidence tended to establish that "annual net sales" referred to the volume of stored beer at a particular Commission store, and not the volume of sales.

AWARD: The grievance succeeds. The Arbitrator ruled that despite the 1972 change in status of the Annapolis store, the manager still performed substantially the same functions as before in regard to the regular orders for C.F.B. Cornwallis, with the sole exception that the beer was no longer directly stored in Annapolis. This fact substantiates the grievor's argument that "annual net sales" refers to volume of sales rather than volume of stored beer.

As a consequence, the Annapolis store will receive an upgrading in its classification, and the grievor will accordingly receive a higher rate of pay.

81-103: Abbie J. Lane Memorial Hosptial - AND The Nova Scotia Nurses' Union

Innis Christie, Chairman, Howard Epstein, Donald McDougall
David Reynolds for the union
Eric Durnford for the employer
November 2, 1981

ISSUES: Refusal to Follow Instructions (7:3610); Preliminary Objection; Change of Position (3:2200)

CIRCUMSTANCES: The grievor, a registered nurse, worked at the same hospital as her husband, a psychologist. Whe she was hired, the grievor was told that she should not work together with her husband in the same unit. For this reason, the grievor subsequently refused all potential temporary postings ("floats") to her husband's unit, and her refusal was generally accepted. However, on the day in question, the grievor was asked to float to the particular unit, and, after repeatedly refusing the assignment, she was suspended, with pay, for the remainder of the day for insubordination.

At the hearing, the union raised a preliminary objection that the employer was now precluded form arguing "just cause" because it had maintained throughout the grievance procedure that the matter was not disciplinary. The Board unanimously disposed of the preliminary objection, holding that while the employer took that position, that was never the view of the union or the grievor, and hence, it was not misled in any way.

The union's argument on the main issue was that the grievor's refusal to obey was based on reasonable grounds, i.e. that it conflicted with her terms of employment. In response, the employer argued that the order was within the hospital's prerogative to give, that it did not conflict with any earlier order given to the grievor, and, even if she thought that it did, she should have obeyed the order and then filed a grievance.

AWARD: The grievance fails. The Board unanimously held that the order was subject to the "work now, grieve later rule", and was not covered by any of the rule's ex-

81-103 (continued)

ceptions. As for the matter of discipline, the Board ruled that the letter sent by the hospital to the grievor after her one-day suspension should be amended to say that there was no disciplinary suspension because of the incident, to clarify the policy of the grievor working in her husband's unit, and to note that the letter in question constitutes a warning for insubordination.

AUTHORITIES CITED:

- Re Beaver Lumber Co. Ltd. (1976), 14 L.A.C. (2d) 93
- Brown and Beatty, Canadian Labour Arbitration
- J. M. MacIntyre, "Work Now, Grieve Later" in Grievance Arbitration: A Review of Current Issues (C.L.E.S. of B.C.)
- Re Ford Motor Company (1944), 3 L.A. 779
- Re Pacific Western Airlines Ltd. (1981, unreported; Christie)
- Re York Farms Ltd. (1981, unreported; Christie)

81-104: Nova Scotia Power Corporation - AND - The International Brotherhood of Electrical Workers, Local 1928

Brian Langille
Gerald J. McConnell for the union
D. Merlin Nunn, Q.C., for the Corporation
December 21, 1981

ISSUES: Revision of Job Classification (5:2420, 5:2440)

CIRCUMSTANCES: The grievors, who were employed as utilitymen with the Corporation, claimed that thev performed painting work that under the collective agreement entitled them to be paid at the higher journeyman painter rate. The collective agreement stated that if an employee is temporarily assigned to a higher rated job classification for a continuous period of at least four hours, he shall be paid the higher rate. The grievors stated that they had worked 31 hours on the painting job in question, and were entitled to the difference in pay between the two positions.

The Corporation argued that a utilityman was a jack-of-all trades position, where the employee was expected to perform a number of varied jobs at a semi-skilled level of efficiency. Accordingly, his level of efficiency at painting, for example, was not expected to be the same as a journeyman painter Hence, even when performing a journeyman painter's job, he was not paid according to that classification because of his lower skill level.

The union's argument was straightforward. In the particular circumstances at issue, a utilityman was assigned to do work, for a continuouus period of 31 hours, that fell within the family of tasks associated with the journeyman painter classification. Utilitymen are utilitymen for the purposes of their pay classification only if the job to which they are assigned turns out to last less than four hours. If the temporary job assignment lastsany longer, they are to be given the appropiate rate of pay at the higher classification.

81-104 (continued)

AWARD: The grievance fails. The Arbitrator held that since painting was clearly part of a utilityman's job, the grievors had not been assigned out of their classification. Almost any task that a utilityman performs can be viewed as falling within the family of tasks associated with some other classification. Hence, the position's intention appears to be the provision of a semi-skilled job that cuts across job classifications. To hold that the collective agreement meant to pay the utilitymen at other rates whenever they performed a task for more than four hours would be to thwart this obvious intention.

AUTHORITIES CITED:

- Re Hydro - Electric Power Commission of Ontario (1973), 2 L.A.C. (2d) 418
- Re Falconbridge Nickel Mines Limited (1969), 20 L.A.C. 45

81-105: Brookfield Foods Limited - AND - Bakery, Confectionery & Tobacco Workers' Union, Local 446

D. Merlin Nunn, Q.C.
Robert Mino for the company
Wallace Jewers for the union
December 7, 1981

ISSUES: Refusal to Work Overtime (7:3630)

CIRCUMSTANCES: The grievor, a lead hand shipper, had a long history of employment with the company with an unblemished work record. The grievor had seniority in his department over eight other men. Under the collective agreement, when the company is required to obtain employees for overtime work, it shall offer the work in order of departmental seniority, with the employee maintaining an initial right of refusal. Where there are no, or not enough, volunteers, the company shall assign work in the reverse order of seniority.

The company, on the occasion in question, required six men for an overtime assignment. The grievor was asked first, in accordance with his seniority, and refused because of a prior personal commitment. He was then told that he must work overtime. He continued to refuse and eventually, the company found other employees to fill the work gang. The grievor was subsequently suspended for two days and demoted.

The union argued that the grievor's refusal was justified under the collective agreement, and that, indeed, it was the company who breached the overtime article by insisting that the grievor work overtime before asking the other, less senior employees.

The company contended that the discipline was correct in the circumstances because of the grievor's insubordination. In any event, even if the grievor was within his right, he should have performed the work and grieved later.

AWARD: The grievance succeeds. The grievor's refusal to work was entirely within the provisions of the collective agreement, which the company failed to follow. As well, the grievor had a reasonable excuse for not working, which precluded a work now - grieve later obligation.

81-105 (continued)

AUTHORITIES CITED:

- Re Brockfield Foods and Canadian Food & Allied Workers (Nova Scotia, unreported)

81-106: Hawker Siddley Canada Inc. - AND - The United Steelworkers of America, Local 1231

Judge J.A. MacLellan
Bob Young for the union
John Howatson for the company
December 8, 1981

ISSUES: Employee Disability (7:3200); Innocent Absenteeism (7:3210)

CIRCUMSTANCES: The grievor, a welder, had had a long history of various illnesses and injuries which had frequently caused him to miss work. He received several warning letters from the company and finally, after missing work for a seven month streatch because of a broken leg, the grievor was fired.

The company did not contend that the grievor's absenteeism was anything but innocent. However, they argued that they should have the power to replace an employee who, although for valid reasons beyond his control, cannot regularly report for work. The company maintained that after a certain stage has been reached, even with innocent absenteeism, the accomodation of the legitimate interests of both employer and employee requires the power of justifiable termination.

The union argued that arbitration caselaw has consistently upheld that absenteeism which is due to causes beyond the employee's control, and without any evidence of misconduct or fault, is not a proper reason for imposing discipline. This grievance, the union stressed, fits within these arbitral principles.

AWARD: The grievance succeeds. There was no evidence that the company investigated the state of the grievor's health, with the intent of establishing whether he would be able to regularly attend work in the future, once he recovers from his injury. Further, the grievor's absenteeism is entirely innocent, and consequently, there is no justification for the imposition of discipline in the circumstances.

The order allowing the grievor was made with the proviso that the grievor can maintain for a period of one year from the date of his return to work, reasonable and normal attendance in the department in which he works.

AUTHORITIES CITED:

- Re Massey-Ferguson (1969), 20 L.A.C. 370
- Brown and Beatty, Canadian Labour Arbitration, p. 302-305

81-107: Deuterium of Canada Limited - AND - Brown and Root Limited

In the Supreme Court of Nova Scotia, Appeal Division

81-107 (continued)

Heard Before: Hart, Jones and MacDonald JJA
Judgement: December 31, 1981

A. Douglas Tupper and Joel Fichaud for the respondent
Deborah Carver for the appellant

ISSUES: Judicial Review (1:5400)

CIRCUMSTANCES: This was an appeal from a decision by the Nova Scotia Supreme Court, Trial Division, which refused to set aside and quash an Arbitration Board decision. The Arbitration Board had ordered the appellant to produce for inspection of the respondent a copy of a transcript of discovery evidence taken during another arbitration between the appellant and another contracting party relating to the same subject matter.

The appellant objected to production on the ground that exhibits attached to the discovery evidence were copies of exhibits loaned to them by a third party, and that they therefore did not have those exhibits within their possession.

AWARD: The appeal was dismissed. The Court of Appeal agreed with the Trial Division's ruling that a party to a proceeding who obtains a copy of a discovery transcript and the exhibits in that proceeding owns these copies and is therefore in legal possession and can be compelled to produce these documents before arbitrators pursuant to s. 3(f) of the Arbitration Act.

By way of dicta, the Appeal Court stated that the Arbitration Board was incorrect in refusing to seek the opinion of the Court, under s. 20 of the Arbitration Act, as to whether it had power to order production of the documents in question for inspection.

A concurring opinion held that since an arbitrator's decision cannot be set aside on the ground that an arbitrator admitted evidence which he or she sought not to have admitted, the present application was not properly before the Trial Division.

AUTHORITES CITED:

- Russell on Arbitration, 19th ed.
- deSmith's Judicial Review of Administrative Action, 4th ed.
- Port Arthur Shipbuilding Co. v. Arthurs et al, (1969) S.C.R. 85
- Cumberland Railway Company v. Brotherhood of Railroad Trainmen, Lodge 684, 3 NSR 705
- Russell on Arbitration and Award, 11th ed.

81-108: Nova Scotia Nurses' Union - AND - Halifax Infirmary Hospital

In The Surpreme Court of Nova Scotia, Trial Division

Heard Before: J. MacIntosh
Judgement: December 14, 1981

David Reynolds for the union - applicant
Eric Durnford for the employer - respondent

81-108 (continued)

ISSUES: Pregnancy and Entitlement to Sick Benefits (8:3320); Judicial Review (1:5400)

CIRCUMSTANCES: The grievor, a registered nurse, suffered from hyperemesis gravidarum, a pregnancy-related illness. She was forced to withdraw from work early in her pregnancy as a result of the illness. She requested sick leave, which the hospital refused to grant, stating that a pregnancy-related illness is not covered by the collective agreement provisions for paid leave. The Arbitration Board dismissed the grievance.

The Union applied to the Nova Scotia Supreme Court, Trial Division, to quash the Arbitration Board's decision, arguing that the Board committed an error in law of the face of the record.

AWARD: The application failed. The Court, after noting the recent judicial caselaw of the limits of review, held that where it cannot be determined on the face of the award whether the Board dealt with any particular question of fact or law in arriving at its decision, it should not indulge in speculation. Consequently, reviewing the Board's entire decision, the Court held that its interpretation was one that the collective agreement would reasonably bear.

AUTHORITIES CITED:

- Canadian Keyes Fibre Company Limited v. United Paper Workers International Union, Local 576 (1974) 8 NSR (2d) 81
- Hughes Boat Works Inc. v. U.A.W. (1980), 26 O.R. (2d) 427
- C.U.P.E., Local 963 v. New Brunswick Liquor Corporation, (1979) 2 S.C.R. 227
- Russell on Arbitration (19th ed) 1979
- Jacmain v. The Attorney General of Canada, (1978) 2 S.C.R. 15

81-109: Duplicate Decision

81-110: Duplicate Decision

81-111: City of Halifax - AND- Halifax Civic Workers' Union, Local 108

Lorne MacDougall, Q.C., Chairman, Robert Street, Joseph Ross
Charles MacDougall for the union
Gerald Geneau for the city
September 4, 1981

ISSUES: Dismissal; Culminating Incident (7:4310); Impartiality of Board Member (1:5210)

CIRCUMSTANCES: The grievor, a truck driver with the City, was spotted by a Halifax police constable at a tavern with his City vehicle during working hours. He had previously been warned against taking the vehicle to the tavern in question.

81-111 (continued)

The grievor admitted taking the vehicle to the tavern, but insisted that the visit was during his lunch hour.

The City viewed the infraction as the latest in a series of disciplinary problems with the grievor, and fired him.

AWARD: The grievance succeeded in part. The Arbitration Board unanimously agreed that the infraction, although serious, was not sufficient to justify dismissal, and substituted a 7½ month suspension. The Board felt that the grievor was capable to reacting to corrective discipline.

The Board dismissed a preliminary objection as to the impartiality of the union nominee. The objection was raised regarding Mr. Ross' involvement in a concurrent strike against the employer. In turning aside the objection, the Board noted the nominee's recent appointment to two other Arbitration Boards during the strike which involved the same employer, with no objection being raised.

81-112: Twin Cities Co-operative Dairy Limited - AND - Teamsters, Chauffeurs, Warehousemen & Helpers, Local 927

Brian Langille
Ronald Pink for the union
Deborah Carver for the employer
August 27, 1981

ISSUES: Employee Right to Overtime (5:3220, 5:3222); Definition of "Normally" in Overtime Context (5:3222)

CIRCUMSTANCES: The grievor, a 'checker-shipper' who also frequently performed the work of a 'palletiser-operator', was not notified of an overtime shift requirement. The regular night palletiser-operator phoned in sick 15 minutes before the beginning of the night shift. The checker-shipper on the day shift, who was already working an evening overtime shift, was offered the assignment.

The collective agreement stated that "preference shall be given to the employee who normally performs the work for which overtime is being scheduled". The grievor argued that although he was classified as "checker-shipper", 80 percent of this time was spent as a palletiser-operator, and hence, he was the employee who "normally" performs the work. The company, in response, argued that the employee's classification as a "checker-shipper" meant that he was not the employee who "normally" performs the work; in addition, they argued that the grievor was not "available" for work, as he lived one half hour away from the plant, with the shift beginning in 15 minutes.

AWARD: The grievance succeeds. The Arbitrator held that the word "normally" means, in this context, "ordinarily". The arbitration process should attempt to find the reality behind classifications and where, as here, the grievor's official classification did not accurately convey his actual duties, it was correct to find that the overtime assignment was the position that the grievor "normally" performs. The Arbitrator also ruled that the fact that the grievor lived some distance from the plant and, if contacted, would have arrived at the shift late, did not affect his "availability", since the assignment was an entire overtime shift.

Nor was the Arbitrator dissuaded by the company's argument that, if the grievor won, he should have his overtime award offset by the wages from his regular shift which he worked the following day; the Arbitrator held that to offset the wages in such a fashion could be based upon sheer speculation of what would have happened the following morning.

81-112 (continued)

AUTHORITIES CITED:

- Brown & Beatty, Canadian Labour Arbitration, p. 218-220
- Palmer, Collective Agreement Arbitration in Canada, p. 502-505
- Re Canada Bread Co. Ltd. (1965), 16 L.A.C. 202

81-113: International Union of Bricklayers and Allied Craftsmen - AND - Bedford Masonry Contractors Limited

Brian Langille
Johnette Carli for the company
Ronald A. Pink for the union
January 16, 1981

ISSUES: Entitlement to Dues, Promotion Fund, Pensions and Health and Welfare Compensation (8:0000)

CIRCUMSTANCES: A prior award had been made by the Arbitrator concerning the outstanding dispute between the parties. However, following the request of the parties, no order concerning payment was made. Rather, the Arbitrator retained jurisdiction should the parties fail to agree. No agreement was reached, and a new hearing was held to quantify the amount of money owing by the employer to the union.

The issue to be quantified was the amount of union dues, and remissions regarding the masonry promotion fund, pensions and health and welfare owing to the union, based on the total hours worked by four particular employees.

AWARD: The Arbitrator accepted the figures offered by the union, based on the employer's payroll records, and ordered the employer to pay the union the quantified amount.

81-114: Cape Breton Hosptial - AND - The Nova Scotia Nurses' Union

R. Lorne MacDougall, Q.C., Chairman, Gerald McConnell, Donald McDougall
Gregory North for the union
Eric Durnford for the hospital
December 8, 1980

ISSUES: Discipline; Absence from Work (7:3100)

CIRCUMSTANCES: The grievor was suspended for five days following a one day absence from work. The hospital, some time before, had introduced a policy of suspending employees for unjustified absence from work, in order to reduce an abnormally high absentee rate. The grievor had been requested to change her weekly shift pattern and admits that she completely forgot to work on the day in question, since it was the first day of the new shift. The grievor's record was otherwise admirable and unblemished. She contends that the five day suspension was too severe in the circumstances.

The hospital's response was that the suspension was justified in light of the serious absentee problem and was the minimum (as well as the maximum) penalty specified in the absent from work policy.

81-114 (continued)

AWARD: The grievance succeeds. The Board majority found that the penalty was too severe and therefore unjust. Through its power to modify penalties of discipline, the Board majority reduced the penalty to one day.

DISSENT: One Board member dissented. While the member was impressed with the grievor's work record, and explanation for her absence on the day in question, he held that the hospital's justifiable attempts to reduce its high absentee rate warranted such a suspension penalty.

81-115: Construction Association Management Labour Bureau Limited, Dawcolectric Limited - AND - International Brotherhood of Electrical Workers, Local 625

Judge J.A. MacLellan
Ronald A. Pink for the union
George Mitchell, Q.C., for the employer association
March 23, 1981

ISSUES: Union Failure to Supply Employees (9:2000); Procedure for receiving evidence (3:441C

CIRCUMSTANCES: This was a grievance filed by the Employer Association, on behalf of its member, Dawcolectric Limited. The Employer Association contended that the union failed to supply employees to the member employer's work site, in accordance with the provisions of the collective agreement. In addition, the Association argued that its members had the right to hire union members directly, rather than going through the union hiring hall.

The union responded by pointing to the negotiating history and past practice between the parties, in order to establish that - except for Halifax - the Employers Association must go to the union to obtain workmen.

AWARD: The grievance fails. The Employer Association withdrew part of their grievance, so that the sole question for the Arbitrator to decide was whether, on the wording of the collective agreement, the employer had the right to hire employees directly. The Arbitrator could find no evidence in the collective agreement, in an ancilliary letter of intent or in the parties' past practice, to support the Association's argument.

AUTHORITIES CITED:

- Brown and Beatty, Canadian Labour Arbitration, p. 129

81-116: Hermes Electronics Limited - AND - International Brotherhood of Electrical Workers, Local 1651

Merlin Nunn, Q.C., Chairman, Thomas MacQuarrie, Q.C., Rene Quigley
R. Pink for the union
E. Durnford for the employer
September 25, 1980

ISSUES: Hours of Work (5:3100)

81-116 (continued)

CIRCUMSTANCES: The union's grievance concerns the company's refusal to regularly rotate its utility men on day and night shiftwork. At the time of the grievance, the company employed two utility men working on a permanent night shift and four utility men working only days.

The union argued that both past practice and the wording of the collective agreement obligated the employer to rotate the employees on the shift.

The employer responded that there is nothing in the agreement to require rotation, nor does past practice establish that rotation has been a regular or accepted feature of shift work at the work site.

AWARD: The grievance fails. The majority of the Arbitration Board accepted the employer's argument that neither the collective agreement nor past practice established any employee right to request regular shift rotation of the utility men.

DISSENT: A minority opinion held that the employer's lack of evidence presentation at the hearing imputs that the collective agreement was signed with the intent and past practice of rotating work shifts of the employees in question.

81-117: R.G. Souther Electric Limited - AND - International Brotherhood of Electrical Workers, Local 625

Brian Langille
Fern Tardif for the union
Neil Franklin for the employer
January 15, 1981

CIRCUMSTANCES: At the beginning of the hearing, the parties announced that they had achieved a settlement of the dispute. The Arbitrator was requested to issue a formal order which embodied the agreement.

By request, the Arbitrator ordered that the employer pay $300 to the union within two weeks of the award, and, that it sign a letter of undertaking to abide by the provisions of the collective agreement for any work done within the province of Nova Scotia, and within the jurisdiction of the union.

The union, in turn, agreed to withdraw the grievance.

81-118: Canso Seafoods Limited - AND - Canadian Brotherhood of Railway, Transport and General Workers, Local 611

Alexander MacDonald
Gerald McConnell for the union
Gerald Hoganson for the company
April 23, 1981

ISSUES: Grading and Pricing of Fish; Setting Rate (8:2220)

CIRCUMSTANCES: The collective agreement between the union and the company had established a grading scheme for the quality of fish caught by fishing trawlers. The fishermen - members of the union - would receive their pay according to whether the fish

81-118 (continued)

was graded premium or standard.

The union grievance alleged that the company's grading of a substantial fish catch as standard instead of premium was a violation of the collective agreement. The union presented two arguments. First, the fish was improperly graded, since the prior history and experience of the crew, using the same vessel and same ratio of ice to fish, had always yielded premium-graded fish. Alternatively, the union argued that if the fish catch was properly graded, then the standard grade of the fish was due to the company's infraction of the practice of unloading the vessel with the oldest fish.

The company's rebuttal was that the vessel caught a large amount of fish in a short period of time, which stretched the crew's ability to properly process and store such an amount. It also referred to the management rights clause, arguing that none of the fish went to market classified as fresh fish.

AWARD: The grievance succeeds. The Arbitrator held that the grading of the deck fish was done in an arbitrary fashion, in violation of the collective agreement. The decision accepted the union's contention that the spoiling of the premium quality of the fish was due to the company's decision not to unload the trawler in accordance with established practice.

AUTHORITIES CITED:

- Re Comco Metal Products Limited (1972), 23 LAC 390
- Re West Rock Industries (1973), 3 LAC (2d) 102
- Re Canadian Industries Limited (1948), 1 LAC 234
- Re St. Lawrence Seaway Authority (1969), 23 LAC 156

NOTE: An application for judical review of the Arbitrator's decision was dismissed by the Nova Scotia Supreme Court, Trial Division.

81-119: Nova Scotia Government Employees Union - AND - Civil Service Commission of Nova Scotia

S. Bruce Outhouse, Chairman, Eric Durnford, Manning MacIntyre
R. Pink for the union
R. Endres for the employer
December 14, 1981

ISSUES: Discipline and Discharge, Incompetence (7:3510)

CIRCUMSTANCES: The Grievor was discharged. Initially, the employer had purported to discharge the grievor as a probationary employee, in which case the just and sufficient cause provision would not have applied. However, the employer did not follow the appropriate procedures, and this discharge was ineffective. In a previous arbitration the grievor had been reinstated, and had become a permanent employee effective January 15, 1976. On February 16, 1976, the employer, recognizing the possible invalidity of the first discharge, purported to dismiss the grievor again. Since the grievor was then a permanent employee, and the just and sufficient cause provisions would normally apply, the employer attempted to circumvent these provisions by seeking to have the employee dismissed by Order-in-Council. The Supreme Court of Canada eventually held that the Order-in-Council was ineffective to override the col-

81-119 (continued)

lective agreement. (This explains the five year delay.) Hence, in order to be justified, the discharge must satisfy the just and sufficient cause standard. After the fact, more or less, the employer sought to justify the discharge on the grounds of incompetence. There were general allegations of incompetence, but the evidence revealed no specifics to substantiate the claims.

AWARD: The grievance succeeds. The grievor is reinstated retroactive to February 16, 1976, without loss of seniority or other benefits. Back pay is, of course, subject to mitigation. The evidence reveals cause sufficient to terminate a probationary employee, but not sufficient to terminate a permanent employee. The board retains jurisdiction to determine damages in the event of failure of the parties to agree.

81-120: Nova Scotia Government Employees Union - AND - Civil Service Commission of Nova Scotia

Brian Langille
R. Pink for the union
R. Endres for the employer
September 25, 1981

ISSUES: Discipline and Discharge; Insubordination, Refusal to follow Instructions (7:3610); Reasonableness of the Penalty (7:4300)

CIRCUMSTANCES: The grievor received a one day's suspension, without pay, for insubordination. The incident developed when the grievor's immediate supervisor demanded, in a not very tactful way, that the grievor type a particular letter immediately. The grievor, who was busy with other work, did not comply. The background of this incident was a stormy personal relationship between the grievor and her immediate supervisor. The grievor had, in the past, often tried to avoid direct dealings with her immediate supervisor. Two months prior to the incident in question, the grievor had been informed, by letter from the section head, that all her work was to be handled through her immediate supervisor. Shortly before the incident in question the grievor had been complaining of an excessive work load, with no response from her immediate supervisor.

AWARD: The grievance fails. Although the grievor's response was somewhat understandable in the circumstances, her conduct amounted to insubordination. The grievor's history of difficulty in accepting direction from her immediate supervisor warrants the conclusion that a one day's suspension without pay is not excessive discipline.

81-121: Nova Scotia Government Employees Union - AND - Civil Service Commission of Nova Scotia

E. J. Flinn, Q.C.
R. Pink for the union
L. Garber for the employer
June 25, 1981

ISSUES: Assignment of Bargaining Unit Work to Non-unit Employees (5:1400): Proprietary Rights to Overtime Assignments (5:3220)

CIRCUMSTANCES: The union, on behalf of six grievors, grieved that the employer had assigned bargaining unit work to non-unit employees. The union sought a declaration only; it abandoned its claim for damages. The grievance arose out of the re-organization in October, 1980 of the Blood Gas Lab of the Pulminary Function Unit at the Victoria General Hospital. From the early 1970's until October, 1980 the Blook Gas Unit had been

81-121 (continued)

staffed as follows: one regular shift (8:00 a.m. to 4:00 p.m.), filled by bargaining unit employees whose regular functions were in the Pulminary Function Unit; and two overtime shifts (4:00 p.m. to midnight, midnight to 8:00 a.m.), filled by bargaining unit employees (including persons whose regular duties were not within the Pulminary Function Unit), by respiratory technology students, by the supervisor, and the other casuals. The overtime shifts were assigned on a draw system. The six grievors were respiratory technologists within the bargaining unit, but their regular duties were not within the Pulminary Function Unit. Before the re-organization, the six grievors averaged four overtime shifts per month. In the re-organizations of October, 1980 overtime shifts were eliminated. The 8:00 a.m. to 4:00 p.m. and 4:00 p.m. to midnight shifts, Monday to Friday, became regular shifts filled by the bargaining unit members within the Pulminary Function Unit. The weekend and midnight shifts were staffed primarily by respiratory technology students (and occasionally by the supervisor). The grievors were accordingly no longer given overtime in the Blood Gas Lab.

The collective agreement contained no requirement on management to provide overtime, contained a broad management rights clause and continued no specific provision prohibiting the employer from using non-bargaining unit employees.

AWARD: The grievance is dismissed. The integrity of the collective agreement does not require that a prohibition against employing non-bargaining unit employees be implied. Indeed, the integrity of the collective agreement dictates the opposite. The Victoria General is a teaching hospital and must provide training for students. The long history of employing students in the Blood Gas Lab (including one of the grievors when he was a student) adds force to this argument. Management has done nothing to undermine the bargaining unit. The increase to two shifts staffed solely by bargaining unit members has in fact strengthened the bargaining unit.

81-122: Nova Scotia Government Employees Union - AND - Civil Service Commission of Nova Scotia

S. Bruce Outhouse
R. Pink for the union
R. Endres for the employer
October 5, 1981

ISSUES: Seniority, Job Posting (6:2310); Skill and Ability Requirement (6:3000); Scope of Arbitral Review (6:3100); Ability and Qualifications Criteria (6:3300)

CIRCUMSTANCES: The union grieved a job posting dispute. The collective agreement required the posting of vacant positions. It provided that where, in the opinion of the employer, two or more applicants were qualified and of equal merit, preference would be given to the most senior. The position of senior assessor was posted in accordance with the agreement. The grievor, with 15 years experience, was unsuccessful. The successful candidate had only two and one-half years' experience, less than the minimum requirements of the position. The evaluation process involved interviews by a panel of four persons. Job performance and experience were not directly taken into account. In the interviews, the successful applicant scored higher than the grievor according to three of the four interviewers. The exception was the grievor's supervisor. However, because of a tabulation error, the supervisor mistakenly assumed that he had scored the successful applicant higher than the grievor. The supervisor at first argued in favour of the grievor, but eventually concurred in a recommendation that the successful applicant be hired. The supervisor testified at the hearing that if he had realized that he had scored the grievor higher, he would not have concurred in the recommendation in favour of the successful applicant. (The successful applicant had since moved on to another job.)

81-122 (continued)

AWARD: The grievance succeeds. The awarding of the position to the successful applicant is set aside, and the employer directed to rehold the competition. The standard of review, given the broad discretion contained in the collective agreement, is that the employer's decision can only be overturned if it is discriminatory, in bad faith, or unreasonable. In this case the tabulation error re the interview scores vitiated the decision. The successful applicant might not have succeeded if the recommendation had not been unanimous. In the alternative, the failure to take any account of job performance and experience was unreasonable.

81-123: Nova Scotia Government Employees Union - AND - Civil Service Commission of Nova Scotia

R. Lorne MacDougall
R. Pink for the union
R. Endres for the employer
August 31, 1981

ISSUES: Jurisdiction,Collective Agreement (2:1200); Preliminary Objections (3:2100); Applications of Seniority (6:2000); Job Posting (6:2300)

CIRCUMSTANCES: The union grieved a job posting dispute. A preliminary question of jurisdiction was raised by the employer. The collective agreement for clerical workers provided that for jobs within the bargaining unit vacant positions were to be posted and where, in the opinion of the employer, two or more applicants were qualified and of equal merit, preference would be given to the most senior. The grievor, a member of the clerical bargaining unit, applied for a job in a different bargaining unit and was unsuccessful. The grievor claimed a violation of the job posting provisions of the clerical workers' collective agreement. The union further argued that the grievor had the right to grieve unfair treatment and have the issue arbitrated. The employer countered that the grievance did not relate to any alleged violation of the clerical workers' collective agreement.

AWARD: The arbitrator has no jurisdiction to hear the merits of this grievance. The clear language of the collective agreement does not cover application for jobs in a different bargaining unit. The employer only has a duty to be fair in the administration of the clerical workers' collective agreement.

81-124: Nova Scotia Government Employees Union - AND - Civil Service Commission of Nova Scotia

S. Bruce Outhouse, Chairman, John Yates, John Merrick
R. Pink for the union
R. Endres for the employer
August 18, 1981

ISSUES: Warnings, suspension, discharge (7:3542); Incompetence (7:3510); Discipline, burden of proof (7:2300)

CIRCUMSTANCES: The union grieved the suspension without pay and subsequent discharge of the grievor for incompetence. The grievor received her nurses' training in Ceylon, and practiced for several years there and in England before coming to Canada in 1974. From March, 1974 until her suspension on November 5, 1980, the grievor worked at the Victoria General Hospital. The grievor was required to write exams in order to become registered in Nova Scotia. She failed several times, but eventually passed and was registered in 1978. Both before and after her registration there were numerous complaints about the grievor's work performance, and her annual evaluations were poor. The grievor was informed of complaints between evaluations, but often not in writing, as stipulated in the collective agreement. The September, 1980 evaluation was particularly poor, and the grievor was informed in writing that further action was being contemplated. Shortly thereafter, the grievor's supervisor received a petition from almost all of the other nurses on the unit complaining about the unsafe practices of the grievor. On November 5, 1980, the employer suspended the grievor pending investigation. Upon investigation, it was concluded that the grievor could not carry out the duties of a registered nurse. The employer decided to put the grievor on a retraining course, to which the grievor agreed. The employer was not very optimistic that this would lead to an improvement. The other nurses on the unit threatened to quit if the grievor was allowed back on the unit. The employer changed its mind about the retraining course. After further consideration, the grievor was dismissed by letter dated December 11, 1980. The termination letter listed several incidents of incompetence. Evidence as to these and other incidents was led at the hearing.

AWARD: The grievance fails. The burden of proof is on the employer to prove incompetence, and it did so. The employer was not restricted to evidence on the incidents listed in the termination letter as long as the further evidence related to the same ground of dismissal, in this case incompetence. Although the employer breached the collective agreement by not advising the grievor in writing of problems between the 1979 and 1980 evaluations, this was irrelevant after the 1980 evaluation was completed. After that, the grievor was advised in writing of further problems. The bulk of the evidence of incompetence related to incidents after September, 1980.

81-125: Nova Scotia Government Employee Union - AND - Civil Service Commission of Nova Scotia

Lorne Clark, Chairman, J. Yates, E. Durnford
R. Pink for the union
L. Garber, J. Spurr for the employer
February 19, 1981

ISSUES: Job Posting (6:2310); Senior Employee if Relatively Equal (6:3220); Seniority, scope of Arbitral Review (6:3100)

CIRCUMSTANCES: The union grieved a job posting dispute re a position of regional supervisor. The collective agreement provided that where the employer determined that two or more applicants were qualified and of equal merit, preference would be given to the most senior. The grievor was a member of the bargaining unit. The successful applicant came from outside the bargaining unit, but was a former employee of the Department and a former regional supervisor. Mr. C. was the successful applicant's former director. The successful applicant was interviewed by Mr. C., alone, before the job was posted. The grievor and another applicant were interviewed after the job was posted, by Mr. C. and another interviewer. From the testimony it was clear the Mr. C. had decided before the job was posted that the successful applicant would get the job. The other interviews were simply a matter of going through the motions. The grievor and other applicant were measured against the successful applicant, not against the job specifications. Negative conclusions about the grievor were drawn from lack of information, unsubstantiated information, and from the fact of a prior recourse to the grievance procedure. The grievor sought to be awarded the position.

81-125 (continued)

AWARD: The grievance succeeds. The employer's determination was totally unreasonable, and was so defective as to amount to no determination at all. The employer is directed to redo the selection procedure. It is recommended that Mr. C. not participate.

81-126: Nova Scotia Government Employees Union - AND - Civil Service Commission of Nova Scotia

R. Lorne MacDougall, Q.C.
R. Pink for the union
R. Endres for the employer
December 16, 1981

ISSUES: Job Posting (6:2310); Senior Employee if Relatively Equal (6:3220); Seniority, Scope of Arbitral Review (6:3100); The Form of Grievance (2:3122)

CIRCUMSTANCES: The union grieved a job posting dispute on behalf of two grievors, both unsuccessful applicants. The collective agreement (clause 39.01) provided that job vacancies be posted on all bulletin boards in all buildings where members of the bargaining unit work. The bargaining unit was province wide. To the surprise of both sides, it came out at the hearing that the notice had not been posted at all the institutions required. The grievors and the successful applicant were not affected by this violation. The collective agreement (clause 39.02) provided that where, in the opinion of the employer,two or more applicants were qualified and of equal merit, preference would be given to the most senior. The grievors grieved the violation of clause 39, but the wording made it clear that the complaints were specifically about clause 39.02. The selection procedure for the posted job consisted of interviews conducted by a three person team. The same set of questions were asked of each applicant. Work performance and future potential were also assessed (given weights of about 40 per cent and 20 per cent respectively), However, only one member of the interview team had information on these factors, which he presented to the other two. The successful applicant scored the highest on the interviews as well as on job performance and future potential. Also, the successful applicant had been doing the posted job on a temporary basis prior to its becoming a permanent position. The grievors sought a redoing of the selection procedure.

AWARD: The grievance succeeds. There was a clear violation of clause 39.01, and many potential applicants might not have known of the position. Although the grievances were more clearly directed to clause 39.02, the whole of clause 39 was referred to. Therefore, the grievance encompasses the violation of clause 39.01. The posting and selection procedures must be redone. Although not strictly necessary in light of the decision on clause 39.01, comments are made about the selection procedure. The test for arbitral review is that the employer must not act arbitrarily, unfairly, unreasonably and in bad faith. Here it might have been unreasonable that only one member of the interview team had any knowledge about job performance and future prospects, factors which weighed approximately 60 per cent.

81-127: Nova Scotia Government Employees Union - AND - Civil Service Commission of Nova Scotia

S. Bruce Outhouse
R. Pink for the union
R. Endres for the employer
March 17, 1981

81-127 (continued)

ISSUES: Job Posting (6:2310); Senior Employee if Relatively Equal (6:3220); Onus and Burden of Proof, Skill and Ability (3:2413); Seniority, Scope of Arbitral Review (6:3100)

CIRCUMSTANCES: The union grieved a job posting dispute. The collective agreement provided that where, in the opinion of the employer, two or more applicants for a position in the bargaining unit are qualified and of equal merit, preference shall be given to the most senior. The grievor, a member of the bargaining unit, applied for a new position and was unsuccessful. It was not really disputed that the grievor was qualified. The successful applicant was from outside the bargaining unit. The selection procedure involved interviews during which the successful applicant received the highest average score. The scores were introduced in evidence, but the interviewers did not testify. The grievor testified that he thought he was equally as qualified as the successful candidate, although he did not know the qualifications of the successful candidate. The successful candidate participated in the hearing to a limited extent.

AWARD: The grievance is dismissed. The agreement gives no absolute preference to qualified bargaining unit employees; seniority is only a tie-breaker. Given the discretion allowed the employer, the employer's decision should not be interfered with unless there is evidence of discrimination, bad faith, or unreasonableness. Only unreasonableness was alleged. The mere assertion by the grievor that he was equally as qualified as the successful candidate was insufficient to establish a prima facie case, and thereby shift the onus of proof of reasonableness to the employer. In any event the employer's evidence established reasonableness.

81-128: Nova Scotia Government Employees Union - AND - Civil Service Commission of Nova Scotia

Brian Langille
R. Pink for the union
R. Endres, M. Melvin for the employer
August 31, 1981

ISSUES: Job Posting (6:2310); Senior Employee if Relatively Equal (6:3220); Onus and Burden of Proof, Skill and Ability (3:2413); Seniority, Scope of Arbitral Review (6:3100)

CIRCUMSTANCES: The union grieved a job posting dispute regarding a position in an outpatient unit. The collective agreement provided that where the employer determined that two or more applicants were of equal merit, preference would go to the most senior. The grievor was a member of the bargaining unit working as a certified nursing assistant in the termination of pregnancy unit. The grievor applied for the job posted. The job in the outpatient unit was, if anything, less difficult than the grievor's current job. The important difference for the grievor was that the posted job would not involve shift work. It was conceded that the grievor was very qualified for the posted job. The successful applicant came from outside the bargaining unit. The selection procedure involved interviewing by one person, with assessment criteria established in consultation with the interviewer's supervisor. The successful applicant scored significantly higher than the grievor. The union claimed that once it proved that the grievor was senior and qualified, the onus shifted to the employer. The employer claimed that the onus to show equal merit rested on the union.

AWARD: The grievance fails. The union bears the onus of making a prime facie case that the grievor is of equal merit. If that onus is met, the employer must show that it had

81-128 (continued)

not acted arbitrarily, unfairly, or unreasonably. This applies to both the determination of selection criteria and the application of those criteria. In this case, the union, since it led no evidence as to the qualifications of the successful applicant, did not raise a prima facie case of equal merit. Also, despite some minor defects in the interviewing process, the employer's selection was not arbitrary, unfair, or unreasonable.

81-129: Franki Canada Limited - AND - International Union of Operating Engineers, Local 721

Milton Veniot
Merlin Nunn for the union
Edgar Dowell for the company
July 15, 1981

ISSUES: Overtime (5:3200)

CIRCUMSTANCES: The union filed a policy grievance, claiming that its members were being denied overtime pay for the hours they worked. The dispute centered on an interpretation of the character of the construction that the union was performing for the employer, a construction firm specializing in 'piling' work.

The collective agreement stated that employees working on excavations, job site preparation, and pier and wharf construction would be paid an overtime premium for any work over fifty hours a week. However, work performed by union members on building construction would pay overtime premiums after forty hours a week.

The construction operation in question involved the building and locating of 340 concrete piles on the Halifax waterfront. The company argued that the project was either an excavation, a site preparation, or a pier and wharf construction and hence, the higher hour qualification before overtime would materialize should apply. The union's position was that the project involved the construction of a building, thus the lower hour qualification is applicable.

AWARD: The grievance succeeds. The Arbitrator examined the character of the construction project against the company's characterizations and found them wanting. He held that the building where the concrete pilings were being located is built on land and rests on the piles. The building was not physically attached to the jetty, pier, or wharf and did not form a necessary part of the jetty, pier, or wharf. Hence, the union's characterization of the project was more accurate, and their claim for overtime premiums was granted.

81-130: Seaboard GM Diesel Limited - AND - International Union of Operating Engineers, Local 721B

Judge J.A. MacLellan, Chairman, Charles Weir, Gregory North
Ken Estrabrooks for the union
Peter Douglas for the employer
July 27, 1981

ISSUES: Overtime (5:3200)

81-130 (continued)

CIRCUMSTANCES: A customer of the employer phoned one of its employees after hours searching for some urgently needed parts. The employee re-directed the customer to the company president, who happened to be on the company premises that evening. The president arranged for the order to be filled out.

The grievance arose because the parts clerk, who would normally complete the order, was not called in to do the work; this was a violation of the Call-In and Overtime provisions of the collective agreement. The employer maintained that, because of the circumstances, they had no opportunity to call in the grievor; further, they were not obliged to call him in, and are only required by the collective agreement to pay overtime in such circumstances when the employee is actually called into work.

AWARD: The grievance fails. The collective agreement did not disclose anything that would oblige the employer to call in employees after working hours. While it would be a display of bad faith if the employer's management personnel regularly performed overtime work on a regular basis that was normally the work of a union member, no such bad faith was displayed here.

PART 2

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PART 4
BROWN & BEATTY TOPICAL CODE INDEX, 1978-1981

BROWN & BEATTY TOPICAL CODE INDEX

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